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REPORTS
OF
CIVIL AND CRIMINAL CASES
DECIDED BY THE
COURT OF APPEALS
OF KENTUCKY.

VOLUME II.
JOHN RODMAN, REPORTER.

VOLUME 79—KENTUCKY REPORTS,
CONTAINING CASES DECIDED FROM DECEMBER, 1879, TO JANUARY 1, 1882. .

PROPERTY OF THE STATE OF KENTUCKY.

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JUDICIAL OFFICERS OF THE STATE.

JUDGES OF THE COURT OF APPEALS.

HON. THOS. F. HARGIS, CHIEF JUSTICE.

ASSOCIATE JUDGES.

HON. THOMAS H. HINES.

HON. WILLIAM S. PRYOR.

HON. J. H. LEWIS.

OFFICERS OF COURT.

JOHN RODMAN, REPORTER.

P. W. HARDIN, ATTORNEY GENERAL.

T. J. HENRY, CLERK.

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Elected First Monday in August, 1880, for Term of Six Years.

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2d District—	HON. J. R. GRACE	CADIZ.
3d District—	HON. B. P. CISELL	HENDERSON.
4th District—	HON. L. P. LITTLE.	OWENSBORO.
5th District—	HON. W. L. DULANEY.....	BOWLING GREEN.
6th District—	HON. T. R. McBEATH.....	LITCHFIELD.
7th District—	HON. P. H. LESLIE.....	GLASGOW.
8th District—	HON. M. H. OWSLEY	LANCASTER.
9th District—	HON. W. L. JACKSON	LOUISVILLE.
10th District—	HON. B. F. BUCKNER	LEXINGTON.
11th District—	HON. P. U. MAJOR	FRANKFORT.
12th District—	HON. J. S. BOYD	CYNTHIANA.
13th District—	HON. ROBERT RIDDELL.....	IRVINE.
14th District—	HON. A. E. COLE.	FLEMINGSBURG.
15th District—	HON. J. F. FINDLAY	BARBOURVILLE.
16th District—	HON. GEO. N. BROWN	CATLETTSBURG.
17th District—	HON. S. E. DeHAVEN.....	LAGRANGE.
18th District—	HON. C. A. HARDIN	HARRODSBURG.

JUDGES OF COMMON PLEAS COURTS.

For Jefferson County.

JUDGE—HON. H. J. STITES LOUISVILLE.

For the Counties of Fayette, Clark, Madison, Bourbon, Scott, Woodford,
Franklin, and Jessamine.

JUDGE—HON. C. S. FRENCH WINCHESTER.

JUDGE OF CRIMINAL COURT.

12th District—HON. GEO. G. PERKINS COVINGTON.

LOUISVILLE CHANCERY COURT.

CHANCELLOR—HON. I. W. EDWARDS LOUISVILLE.

VICE CHANCELLOR—HON. ALFRED T. POPE LOUISVILLE.

CHANCERY COURT.

For the Counties of Campbell, Kenton, Bracken, and Pendleton.

JUDGE—HON. JOHN W. MENZIES FALMOUTH.

COMMONWEALTH'S ATTORNEYS.

Elected First Monday in August, 1880, for Term of Six Years.

1st District—C. A. THOMAS BLANDVILLE.
 2d District—J. B. GARNETT CADIZ.
 3d District—J. H. POWELL HENDERSON.
 4th District—J. F. NOE CALHOON.
 5th District—J. M. PORTER BOWLING GREEN.
 6th District—W. R. HAYNES LITCHFIELD.
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 8th District—R. C. WARREN STANFORD.
 9th District—A. G. CARUTH LOUISVILLE.
 10th District—C. J. BRONSTON LEXINGTON.
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 17th District—J. S. MORRIS SHELBYVILLE.
 18th District—T. A. ROBERTSON HODGENVILLE.

MEMORANDUM.

HON. JOS. H. LEWIS was re-elected August, 1882, for the term of eight years.

RULES OF THE COURT OF APPEALS.

ADOPTED OCTOBER 10, 1886.

The following were ordered to be recorded as rules of practice of this Court:

1. But two oral arguments on each side will be allowed in any case, and every such argument will be limited to one hour.

2. Where the appellant shall fail to appear, on the calling of the cause, either by himself or counsel, or by brief, the appellee shall, on his appearance, either by himself or counsel, or by brief, be entitled to a non-suit, and the Court will, in such cases, so order.

3. In every case hereafter entered, heard, or submitted, it shall be the duty of the Clerk to send to the Court, on the same day, the record and papers pertaining to such case.

ADOPTED OCTOBER 20, 1888.

Records not made out in a legible handwriting, or not indexed, are to be condemned, and the Clerk making out such record to be prohibited from collecting anything therefor; and the Clerk of this Court will disregard the expense thereof in taxing costs without any special order in the case.

ADOPTED JULY 7, 1869.

The Clerk of this Court shall put no case on the Docket until the Attorneys shall make a memorandum on the record of all the parties, appellants and appellees, and the judgment appealed from, designating the page of the record and the term of the Court at which it was rendered.

ADOPTED MARCH 7, 1870.

Hereafter the causes, as set on the Docket, shall have precedence of argument on the day so set, and until they are disposed of, if ready for hearing; but if not, they shall be placed among the passed cases, which shall have precedence

Rules.

in that class of cases according to their numbers on the Docket; and the agreement of the parties to assign such cases for hearing on a future named day shall not alter this priority.

ADOPTED NOVEMBER 11, 1873.

The Docket for each term of this Court shall be made out and closed twenty days before the commencement thereof; and no case shall be docketed unless the record shall have been filed before the time above fixed for the close of the Docket.

ADOPTED APRIL 22, 1875.

It is ordered that, after the Summer Term, which commences on the first Monday in June, 1875, the Terms of this Court shall commence and end as follows:

The January Term shall commence on the first Monday in January and end on the 30th day of June, and the September Term shall commence on the first Monday in September and end on the 24th day of December in each succeeding year.

ADOPTED JUNE 28, 1877.

Ordered, that the Clerk of this Court shall not place on the Docket, for the next term, any appeal filed in his office since the first day of last January, whether the judgment was rendered before or since that time, unless an assignment of errors in such case be filed in his office twenty days before the first day of said term.

ADOPTED JUNE 29, 1878.

1. That the Clerk shall prepare and keep one Docket, to be styled "The Attorneys' Docket," and one to be styled "The Argument Docket." [Repealed.]

2. That Attorneys intending to argue a case orally must enter, or cause it to be entered, on the Attorneys' Docket, at least five days before the commencement of the call of the Docket of the Judicial District from which the case

Rules.

comes; and a failure to have the case so entered will be deemed a waiver of the right of oral argument. [Repealed.]

3. Immediately after the Attorneys' Docket for a District is completed, the Court will direct the causes to be set on the Argument Docket for hearing, and fix a time when each will be heard; and the Clerk will cause the Argument Docket to be published with the proceedings of the Court. [Repealed.]

The cases will be set on the Argument Docket in the order in which they appear on the Court's Docket, unless the Court shall, upon satisfactory reasons being shown, vary this order; but the regular order will not be varied except by agreement of the parties or after reasonable notice by the party moving for such special assignment to an Attorney of the adverse party. [Repealed.]

After a cause is set on the Argument Docket for hearing, counsel will not be allowed to change the time for hearing it, unless satisfactory reasons be shown and the consent of the Court be obtained. [Repealed.]

4. When there is no cause for argument, the Court will only be opened on Tuesdays, Thursdays, and Saturdays.

5. When two members of the Court desire it, a rehearing shall be granted.

6. These rules, except the 5th, shall not apply to criminal or penal cases. [Repealed.]

ADOPTED FEBRUARY 10, 1879.

When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this Court is made part of a record in another case, and not copied into the transcript, the Attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.

ADOPTED NOVEMBER 19, 1879.

1. A party intending to move that the Clerk of the inferior Court, or the adverse party, shall be adjudged to pay

Rules.

the costs resulting from a violation by such Clerk or party of such subsection 11 of section 737 of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.

2. If the motion is against the Clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

ADOPTED MARCH 2, 1881.

1. In cases not on the Argument Docket, brief for appellant must be filed five days before calling of the cause, and the brief of appellees one day before.

2. When cases are upon the Argument Docket, counsel for appellant must file, five days before the time for which the case is set, a brief statement of points intended to be relied upon in argument.


3. Counsel are required to cite, at end of brief or statement, all authorities relied upon.


4. No brief shall be filed after submission of cause, except by permission of Court, and for cause shown.

The above rules, adopted March 2d, 1881, will take effect September 1st, 1881.

ADOPTED DECEMBER 17, 1881.

Ordered, that the Attorneys' Docket, the Argument Docket, and the rules, except the 4th and 5th, adopted June 29th, 1878, be abolished.

 Counsel, in writing briefs, are requested by the Court to write only on one side of the paper.

 The Reporter calls *special* attention of counsel to rules adopted March 2, 1881.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1880.

CASE 1—PETITION ORDINARY—DECEMBER 13, 1879.

Warren, &c., v. Fant's trustee.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

1. When a surety has been discharged from legal liability upon a written obligation, by its alteration without his consent, a subsequent promise by him to pay is not binding, unless made upon some new consideration.
2. Words added upon the margin of an obligation, and above the signatures of the obligors, by an arrangement between the obligee and principal obligor, after the delivery of the writing, are to be deemed a part of the obligation, and, if added without the consent of the sureties, and their liability is thereby increased, they are released.

HAISELL & MITCHELL FOR APPELLANTS.

1. The addition to the writing sued on was a "material alteration," which released the sureties. The words added are a part of the obligation, although written on the margin. (Daniel on Negotiable Instruments, secs. 149, 1373 and 1375; Woodworth v. Bank of America, 19 Johnson, 391; Lisle v. Rogers, 18 B. M., 538.)
2. The effect of the alteration was to render the note utterly void, as to the sureties, from the instant it was made, and the subsequent promise to pay, if one was made, was without consideration, and, therefore, not binding. (Cotton v. Edwards, 2 Dana, 106; Blakey v. Johnson, 13 Bush, 202; Emmons v. Overton, 18 B. M., 650; Peabody v. Harvey, 4 Conn., 119; Huntingdon v. Harvey, 4 Conn., 124.)
3. The court having directed the jury to find specially, it was error to give any instructions. (Civil Code, secs. 317 and 327.)

Warren, &c., v. Fant's trustee.

BUSH & PORTER FOR APPELLEE.

1. Even if the court erred in giving and refusing instructions, appellants were not prejudiced, as the jury did not return a general verdict, and the instructions could not have affected the special findings.
2. The jury having found that appellant ratified the alteration of the contract, the court acted properly in rendering judgment for appellee.
3. The marginal indorsement upon the obligation was a *new* agreement, and not an alteration of the original contract; and therefore the sureties were not released. (Jones v. Alexander, &c., MS. Op., Dec. 5, 1876; 3 Bibb, 10; *Ibid*, 360; 4 Bibb, 292; *Ibid*, 300.)

H. T. CLARK FOR APPELLEE.

Brief not with record.

JUDGE COFER DELIVERED THE OPINION OF THE COURT.

The reply admitted that the words on the margin of the obligation sued upon were written at the suggestion of the appellee, in the absence of the sureties, and by implication at least, without their knowledge or consent.

Those words, if taken to be a part of the note, increased the liability of the sureties, and released them, unless they are bound by subsequent ratification or promise to pay.

The words added were written on the face of the paper which contained the obligation, and above the signatures of the obligors; they were put there at the instance of the obligee to secure a benefit that would not have been secured without them; the appellee insisted that the sureties were bound by them, refused to accept what he would have been entitled to without them, and in his original petition declared on them as a part of the writing.

This is sufficient to show that the appellee regarded them as a part of the obligation, and that they are to be so regarded is abundantly established by authority. (Daniel on Negotiable Instruments, sec. 149, *et seq.*)

Warren, &c., v. Fant's trustee.

That the words in the margin were written after the obligation was delivered being admitted, and the jury having found that Warren promised to pay the debt after he was informed that the addition had been made, the question for decision is, whether such promise renders him liable on the obligation as if the addition had been made before he signed, or afterward with his consent.

He was merely a surety, and we think it clear that no subsequent ratification of the addition, or promise to pay the debt, can bind him, unless made upon some new consideration.

That he was not bound during the time that elapsed between the making of the alteration and the ratification or promise, all will concede. The alteration released him, and thereafter, before he ratified it or promised to pay the debt, he was no more bound than if he had never signed the obligation at all. (*Blakey v. Johnson*, 13 Bush, 197.)

That one who never signed the paper, or whose name was signed without authority or claim of authority to do so—whose name was simply forged—cannot be bound by a subsequent promise to pay the debt or ratification of the signing of his name, is, we think, clear upon both principle and authority.

In *Emmons v. Overton* (18 B. Mon., 650), this court held, that “when a surety is discharged from his legal liability, a promise to pay the debt, even if the promise were in writing, would not be legally binding, unless it was made upon sufficient consideration.”

In *Cotton v. Edwards* (2 Dana, 106), it was said, that “an obligation once destroyed, so that it is no longer binding, cannot, in the nature of things, be resuscitated without the consent of the obligor. It must be done by a new contract,

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to which the obligor is a party." And, as said in *Emmons v. Overton*, *supra*, if the obligor thus discharged be a mere surety, and, therefore, under no more obligation to pay the debt, the new promise must be made upon sufficient consideration; *i. e.*, some new consideration.

In *Blakey v. Johnson* (13 Bush, 202), we said, that "if a surety does not assent to the alteration of the terms of his undertaking, it ceases when materially altered to be his contract, and it has henceforward no more force as to him than if the whole writing had been a forgery from the beginning," &c.

These authorities seem conclusively to settle the law to be, that when once a surety is discharged from legal liability, his discharge from that obligation is final and irrevocable.

It is not claimed that Warren made his new promise upon any new consideration, and the jury did not find that Ewing had made any such promise, and if they had, what we have already said would dispose of the question as to him also.

We are, for these reasons, of the opinion that the court erred in rendering judgment for the appellee on the special findings, and the judgment is reversed, and the cause remanded, with directions to render judgment for the appellants.

Davidson's ex'rs v. Kemper, &c.

CASE 2—EQUITY—FEBRUARY 27, 1880.

Davidson's ex'rs v. Kemper, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The devise of the estate by the testator is to his executors, to make profit, increase, and income for the benefit thereof.
2. Neither the whole nor any specific portion of the income is to be appropriated by the executors for the benefit of Charles Davidson, but only such sums, not exceeding the income of one fourth thereof, as they may deem most expedient.
3. It is manifest that the testator did not intend to give to his son Charles any estate independent of the will of the executors; but it was given to the executors, who, in the exercise of their discretion, were to apply not exceeding the income thereof to Charles Davidson's support.
4. Inasmuch as the trust is not enforceable by the beneficiary, the estate cannot be subjected by his creditors.

JAMES SPEED AND THOS. SPEED FOR APPELLANTS.

1. It is clear that Charles Davidson has no interest in the estate that he could demand of the executors, or that can be subjected to the payment of debts that he may contract. The executors alone have discretionary power to say how much he is to receive.
2. We maintain that, according to the authorities, sec. 21, chap. 63, Gen. Stat., has no application to this case. (1 Otto, 726; 2 Rawle, 33; 7 Wills, 547; 47 Penn. St., 113; 21 Conn., 1; 10 Gratt., 336; 35 N. Y., 361; Eastland v. Jordan, 3 Bibb, 186; Cosby v. Ferguson, 3 J. J. Mar., 264; Pope v. Elliott, 8 B. Mon., 56; Samuel v. Johnson, 12 B. Mon., 479; Samuel v. Salter, 3 Met., 259; White v. Thomas, 8 Bush, 661.)

HARLAN & WILSON FOR APPELLEES.

1. Under the testator's will, Charles Davidson is entitled to the income of one fourth of the estate devised, and under sec. 21, art. 1, chap. 63, Gen. Stat., the income is subject to the debts of the *cestui que trust*.
2. He had a right to demand of the executors that they pay him not exceeding the value of one fourth of his share, if he was diligent and safe, and inclined to business, or that it would induce him to attend to business. The statute cannot be repealed by any at-

2r	5
5r	424
587	119
79	5
6116	394
79	5
6116	394

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tempt of the testator to keep the creditors of his son from subjecting his estate to the payment of his debts. (Pope v. Elliott, 8 B. Mon., 56; Eastland v. Jordan, 3 Bibb, 186; Jones v. Langhorn, 3 *Ib.*, 455; Crosier v. Young, 3 Mon., 159; Cosby v. Ferguson, 3 J. J. Mar., 264; Flournoy v. Johnson, 7 B. Mon., 693; Samuel v. Salter, 3 Met., 259; White v. Thomas, 8 Bush, 661; Anderson v. Briscoe, 12 Bush, 344.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

The question is, whether the interest of Charles Davidson, under the will of his father, William H. Davidson, can be subjected to the payment of the debts of Charles Davidson.

The pertinent clauses of the will are as follows:

"I appoint Joshua F. Speed and James W. Hinning . . . executors of this my will, and direct that no security be required of them or either of them in qualifying or acting as such; and I do hereby devise to my said executors all my estate, both real and personal, whether in possession, remainder, or reversion, and wherever situated, for the uses and purposes hereinafter directed and provided."

The fourth clause is as follows: "The entire residue of my estate, real and personal, shall be held, used, and controlled by my said executors for the equal use and benefit of my said wife, Letitia, and my three children, Henry G. Davidson, Alice B. Davidson, and *Charles Davidson*, share and share alike, and my executors are empowered and requested to manage the estate in such way as may seem to them most to redound to the increase thereof, and to the best interest of my said wife and children, and full power is hereby given and devised to my said executors, in their discretion, to sell and convey any and all of my real estate, . . . it being my intention to clothe my said executors with, and I do hereby grant to them, ample and full discretionary powers to control and dispose of my

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estate, and to *make profit, increase, and income for the benefit thereof* in the same way and as fully as I could lawfully do if living, subject only to the express provisions of this will; and my said executors are not to be responsible for any loss on account of accident or error in judgment in any such sales, purchase, investment, or re-investments as herein provided for."

The seventh clause reads:

"My said executors shall pay to each of my said three children, or *for their use and benefit*, quarterly, half-yearly, or annually, as they may deem most expedient, a sum or sums suitable and proper for the support of each, not exceeding to either the income or profits of his or her share of my estate under the control of my executors (*i. e.*), the share of each during the life of my wife, being one equal fourth part, and if she dies without a will, then the share of each being one equal third part of my estate; or if she disposes by will, as above provided, then the share of each of my children under this will will be an equal third part of that remaining in the hands of my executors; and my executors, to do equal justice to each devisee under this will, may keep the funds in common during the life of my wife." . . . "Neither of my two sons, nor my daughter, . . . shall have any power or right to sell or encumber any part of my said estate in the hands of my said executors, or *the profits or income thereof, or to anticipate the receipts thereon*, nor shall my said estate or any part thereof be *in any way liable for the debts, engagements, or contracts of either of them*, and my estate and every part thereof, which shall be held by my executors in trust for my said children and their issue, shall remain in trust as to the share of each, *and the disabilities of alienation or encumbrance by them and their issue continue for the period of the life of each of my said children,*" &c.

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"All discretionary powers herein delegated to my said executors are personal trusts to them."

It is further provided, that if the executors should fail to act, the Louisville Chancery Court should have power to appoint, but that such appointees "shall execute only the positive duties under this will, according to law, paying over the income to the parties entitled, holding the principal undisturbed, and shall not exercise any discretionary powers herein given to my executors as to buying and selling and trading on my estate."

From these provisions of the will it is clear that the testator designed that the children should not, under any circumstances, receive more than the proceeds of a certain portion of the estate, which was to be expended, as the judgment of the executors might approve, in their support. It is equally clear that the trust in the executors was a personal trust, and that the testator attempted, so far as it was possible to do, to dedicate such portion of the proceeds as the executors might deem proper, to the support of the children, and that it should not be liable, under any circumstances, for the debts of the children.

Will the statute permit that intention to be carried into effect?

Section 21, article 1, chapter 63, of the General Statutes, reads:

"Estates of every kind, held or possessed in trust, shall be subject to the debts and charges of the persons to whose use, or for whose benefit they shall be respectively held or possessed, as they would be if those persons owned the like interest in the property held or possessed as they own or shall own in the use or trust thereof."

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This statute has, in substance, been the law of this State since January, 1796 (Morehead and Brown's Statutes, page 443), and has been frequently construed by this court.

In *Eastland v. Jordan*, 3 Bibb, 186 (1813), a negro was transferred by deed in trust, "that the proceeds of his hire should be applied to the maintenance of Goodrich Light-foot during his life." It was held that the *cestui que trust* had a life estate in the negro that could be subjected to the satisfaction of his debts.

In *Cosby v. Ferguson*, 3 J. J. M., 264 (1830), a deed of trust by Cosby, transferring \$30,000 in trust for the benefit of himself and family, the interest to be appropriated to the maintenance and use of his family and himself during their lives—Held that the interest of Cosby could be subjected to the payment of his debts.

In *Pope's ex'r v. Elliott*, 8 B. M., 56 (1847), the testator directed his executors to appropriate twenty-five dollars per month to the support of his son Robert during his life. Robert becoming indebted, a suit was brought by a creditor to subject a certain sum in the hands of the executors, which had accumulated by reason of the monthly allowance not having been paid out, and also to subject the monthly allowance of twenty-five dollars, as it might accrue.

Chief Justice Marshall, delivering the opinion of the court, said: "If the executors were or are indebted to Robert Pope to the extent that the \$25 a month, directed to be appropriated to his support, may have at any time accumulated in their hands, we are of the opinion that, prospectively, they are not and cannot be said to be indebted to him in any sum of money; that they are under no obligations to pay him \$25 a month in future, but only to appropriate that sum to his support; and if they are under any obligation to

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pay him any portion of that sum, it is only so much of it as may not be required for his support, and to which he may become entitled only on that ground, or because, having provided otherwise for his own support, he should be compensated therefor out of the fund appropriated for that purpose to the extent of \$25 a month. . . . We are of the opinion that the decree has gone too far in appropriating to the complainant's demand any part of the allowance of \$25 per month, beyond the accumulations in the hands of the executors at the date of the decree. . . . The attachment operated only upon the accumulations in the executor's hands at the filing of the bill."

In *Samuel & Johnson v. Ellis*, 12 B. M., 480 (1851), the will, after directing a sale of the real estate, and an equal division among the children, continues: "except my son Ottoway's and my daughter Nancy's part, their portion shall remain in the hands of my executors, to be disposed of as they may think best for them and their heirs." It was held that the interest of Ottoway was subject to his debts.

In *Samuel v. Salter*, 3 Met., 260 (1860), the will directed the trustee to "furnish to my son, from time to time, as he may need the same, such sums as may be sufficient for the reasonable and comfortable support of said son during his life." The will further provides, that in furnishing maintenance to the son, the trustee shall not be restricted to the profits of the estate, but may consume the estate itself if necessary for the comfortable maintenance of the son. It was held that the interest of the son extended to the whole estate, and that it could be subjected to the payment of his debts.

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In *White v. Thomas*, 8 Bush, 662, there was a devise of the use, during life, of certain real and personal property, and a provision that any attempt on the part of the *cestur que trust* to alienate it, or on the part of any creditor to subject it to the payment of the debts of the *cestui que trust*, should terminate the right to use and enjoy the property. It was held that the interest could not be subjected.

It will be observed that where, in the cases cited, the interest of the beneficiary has been subjected, there was an absolute appropriation of a certain sum for the benefit of the *cestui que trust*, to be applied in some instances under the direction of the trustee, but in no case, as here, has it been left discretionary with the trustee as to whether the *cestui que trust* should have the use or benefit of any of the property held in trust. In view of the language of the will in this case, it is unnecessary to consider whether, under the authorities cited, an absolute appropriation of the proceeds of one third of the estate to the maintenance of Charles Davidson would have authorized the court to subject it to the payment of his debts. The devise of the estate is to the executors "to make profit, increase, and income for the benefit thereof." Neither the whole nor any specific portion of the income is to be appropriated for the benefit of Charles Davidson, but only such sums, not exceeding the income, as the executors "may deem most expedient." That the will makes the trust in the executors a personal trust renders it manifest that it was not the intention of the testator to give to Charles Davidson any estate or interest which was to be independent of the wishes of the executors. It was not intended to give him any enforceable claim against the executors, but the estate was given to the executors to be managed and increased for the benefit of those who were to

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come after, with a naked permission to use, not exceeding the income of a certain part of the estate, for the support and maintenance of Charles Davidson. The designation of the parts of the estate was intended only to indicate the portion from which the income to be appropriated within the discretion of the executors should spring. There is no debt due from the executors to Charles Davidson, and no duty on their part to him which is enforceable at law or in equity; and, consequently, there are no rights to which creditors can be substituted. The executors hold no "estate in trust" for Charles Davidson, either within the letter or spirit of section 21, article 1, chapter 63, of General Statutes.

In Perry on Trusts, section 508, it is said: "Discretionary powers of trustees are usually divided into four principal classes, as follows: 1. When it is left to the discretion of the trustees to make or withhold a gift or appointment of the trust property to a specified donee, or *cestui que trust*, or class of donees. In this class, if it is a condition precedent to the gift, legacy, or other interest, that the trustees shall exercise their power in favor of the donee, whether of appointment or assent, no interest will vest in the donee until the power is exercised; and if the trustees refuse to exercise it, the gift cannot be enforced. The court cannot decide upon the propriety or impropriety of the refusal of the trustees to give their assent, unless it proceed from selfish, corrupt, or improper motives; and the burden is upon the donee to prove such motives, and not upon the trustees to show good reasons for their action."

The trust in this case clearly comes under the head of this general classification of discretionary powers, and as it is not enforceable by the beneficiary, it cannot be reached by his creditors.

 Pennington v. Woolfolk, &c.

Judgment reversed so far as it subjects any property in the hands of the executors, and cause remanded for further proceedings.

 CASE 3—EQUITY—APRIL 20, 1880.

Pennington v. Woolfolk, &c.

APPEAL FROM JEFFERSON COMMON PLEAS COURT.

1. The county court, although classed in the judiciary department by the constitution, and possessing judicial powers, is not exclusively a judicial tribunal. Many other matters not judicial have been vested in this court since the adoption of the first constitution of Kentucky.
2. The act, entitled "An act to amend article three of chapter five of the General Statutes," approved February 23, 1874, is unconstitutional.
3. The subject of the act is not expressed in its title.

R. W. WOOLLEY AND P. B. MUIR FOR APPELLANT.

1. The writ of prohibition is an extraordinary judicial writ, issuing from a court of superior jurisdiction. (High on Ex. Rem., sec. 762; Fitzherbert's *Natura Brevium*, 39.)
2. It is the remedy afforded by the common law against the encroachments of jurisdiction by inferior courts. (High on Ex. Rem., sec. 762; *Thomas v. Meads*, 36 Mo., 232; *People v. Woods*, 7 Wend., 486; Civil Code, sec. 479; 5 Dana, 20; 20 N. Y., 531; *Jacob's Law Dic.*, title "Prohibition;" 1 Term Rep., 552; 3 *Ib.*, 3; *Brooke's Cases*, Vaughan, 157; 209 *Langdell's Case*; 12 Coke, 58, 109; 2 *Institutes*, 601; *Fitzherbert's Nat. Brev.*, 40; *Moore*, 780; *Anderson's Rep.*, 258; 13 Coke, 9; 6 Mod., 91; 13 Coke, 4; 6 Mod., 78; 1 *Levinz's*, 164.)
3. The county court had no jurisdiction to take cognizance of the petition. (6 *Bonney*, 98; 4 *Peters*, 511; 17 *Johnson*, 283; 14 *East.*, 370; 11 *Ib.*, 290, 518; *Gen. Stat.*, 430; *Johnson v. City of Lexington*, 14 B. Mon., 648.)
4. The whole statute is vicious and unconstitutional. (10 *California*, 402; *Marshall v. McDaniel*, 12 *Bush*, 385; *Campbell County Court v. Taylor*, 8 *Ib.*; 6 *Bush*, 581; 1 *Ib.*, 250.)

2r	18
4r	269
84	515
85	211

79	13
89	122

79	13
105	121

79	13
109	268

79	13
e112	16

79	13
118	621

79	13
123	52
d123	612

79	13
1125	514
126	367

Pennington v. Woolfolk, &c.

C. B. SEYMOUR AND L. C. WOOLFOLK FOR APPELLEES.

1. A demurrer was a proper proceeding. A writ of prohibition was not the proper remedy. (High on Ex. Rem., sec. 770; sec. 3, art. 1, chap. 93, Gen. Stat.)
2. The county court has jurisdiction. (Act Feb. 23, 1874; Sess. Acts, 67.)
3. The act is constitutional. (L. & N. R. R. Co. v. Commonwealth, 1 Bush, 250; McAllister v. Commonwealth, 6 Bush, 581; Barrett v. City of Henderson, 4 Bush, 255.)

CHIEF JUSTICE COFER. DELIVERED THE OPINION OF THE COURT.

Proceedings were instituted in the Jefferson county court by the appellee, who is county attorney of that county, under an act, entitled "*An act to amend article three of chapter five of the General Statutes,*" approved February 23, 1874, Acts 1873-'4, 147).

By that act the General Assembly attempted to re-enact sections 3, 4, 5, 6, 7, 8, and 10, of article 1, sections 1 and 5, of article 2, and sections 2, 3, 4, 5, and 6, of article 3, of chapter 93, of the General Statutes, which had been previously repealed, and to impose upon the county attorney of the counties respectively, the duties imposed by chapter 93 upon the revenue agent.

Section 3 of chapter 93, as re-enacted by the act of 1874, *supra*, and thereby made part of chapter 5, provides that when any person owning property in this Commonwealth has failed, since January 10, 1856, to list his property with the assessor, whose duty it was to assess the value thereof, or with the supervisors of tax, or the clerk of the county court, it shall be the duty of the county attorney to give information thereof to the county court of the county in which said property should have been listed; and that the court shall summon such person before it, and upon being satisfied that he has failed to list his property, "to assess and fix the value of the same for the years such property was not

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assessed, and the *same* shall be certified by the said court to the proper officers for the collection *thereof*.

The appellant appeared in the county court, and moved to quash the summons; but his motion was overruled. He then demurred to the information, and the demurrer having been also overruled, he applied to the common pleas court for a writ of prohibition against the county judge and county attorney forbidding them to take any further action in the proceeding against him.

The common pleas court sustained a demurrer to the petition, and dismissed it. This appeal is from that judgment.

It is not claimed that the county court was proceeding irregularly, if it had jurisdiction to proceed in the matter at all.

In the recent case of *Howell v. Commonwealth* (ante), it was contended that the statute is unconstitutional, because the title does not indicate the subject of the act; but we did not find it necessary to pass upon the point in that case.

In this case the point there made is not relied upon. If, however, we find the act constitutional in other respects, it will become necessary to decide whether the title is insufficient, because if, for that reason, the act is void, the county court had no jurisdiction, even to entertain the proceeding.

The objection taken to the act in this case is, that by it the Legislature has attempted to confer on a judicial tribunal a power not judicial in its nature, in violation of article one of the Constitution, which declares that—

SEC. 1. "The powers of the government of the State of Kentucky shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to-wit: Those which are legislative to one; those

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which are executive to another; and those which are judiciary to another.

SEC. 2. "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The power to impose taxes is legislative, and cannot be conferred, under our constitution, upon a strictly judicial tribunal or officer.

The power to assess property for taxation, that is, to apportion the tax upon the property upon which the legislature has imposed it, is not judicial, and can no more be conferred upon a judicial tribunal than the power to levy taxes.

But the county court, although classed in the judiciary department by the constitution, and possessing judicial powers, is not an exclusively judicial tribunal.

We might not be able to sustain this position if compelled to rely alone upon the constitution, and denied the right to look to the practical construction uniformly given to it since the formation of the government.

But in the light of the unchallenged action of all departments of the government since the adoption of the constitution of 1792 to the present time, we entertain no doubt that the county court must now be regarded, as respects a number of matters local and exceptional in their nature, as excepted out of this provision of the constitution.

Each of the prior constitutions contained the precise language of our present constitution quoted *supra*.

In 1793 (M. & B., 503), the legislature enacted a law making it the duty of the county court "to take bond and security of the sheriff or collector" of the public revenue,

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and to appoint two of their own body to settle with such sheriff or collector, and report such settlement to the court. An act of 1796 (M. & B., 504) gave the county court cognizance of the settlement of the accounts of guardians and of admitting deeds to record. It also gave power "to grant ordinary license, and regulate and restrain ordinaries and tippling-houses;" to purchase land and cause public buildings to be erected, and "if the court of any county shall, at any time think fit, they are hereby authorized and empowered, at the charge of their county, to cause a ducking-stool to be built in such convenient place as they should direct." An act of 1810 (M. & B., 506), gave that court power to "lay a county levy covering the amount of claims against such county at the time of laying such levy, or which it was known would become due under engagements for public buildings by the time said levies would be collected and accounted for by the several sheriffs or collectors, adding a reasonable overplus for probable delinquents," &c.

By subsequent statutes county courts were empowered to establish roads and ferries, and to fix the rates of ferriage and the charges to be made by innkeepers. To these may be added acts giving the county court power to provide for the poor, and to take measures to prevent the spread of the small-pox, and many others of a similar character which it is not deemed necessary to refer to.

That the greater part, if not all, of the powers above referred to as having been conferred upon the county court are non-judicial in their nature, will not be disputed; but in no instance of which we are aware was the constitutionality of any of these acts assailed, and certainly none of them were ever pronounced by this court to be invalid.

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But we are not left to infer from the enactment and long continued existence of statutes of a merely kindred nature to that now under discussion that it has through the whole legislative and judicial history of the state been regarded as competent to confer upon the county court powers not in their nature judicial, and especially powers relating to the revenue of the state.

We find that in 1819 (M. & B., 1373-76) the legislature enacted a law providing that the assessor should report in writing to the county court a list of all persons who had omitted to give in a list of their taxable property, or who should give a false, fraudulent, or imperfect list, and also providing for a proceeding in the county court similar to that provided for in the statute we are considering, and that the court should "proceed to hear and determine the same, and give judgment for a fine and triple tax, as directed by law, *and determine the value whereon to fix the triple tax;*" and further, that "the court, by the report of the commissioner, oath of the party, or other competent evidence, might proceed to ascertain the articles of taxable property belonging to such delinquent or delinquents, and the value thereof." The act also provided that a person who had failed to list his property might, although not proceeded against, list it with the county court, and that the sheriff or a private person might report any delinquent to the county court, and that the court should ascertain the articles of taxable property belonging to such delinquent, and the value thereof, and should cause to be certified to the sheriff or collector and the Auditor a true list of all taxable property given in to the court.

This act continued in force until it was superseded by the Revised Statutes, enacted after the adoption of the

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present constitution, and its main features were re-adopted, or rather continued in force, in sections 20 to — (inclusive), of article 6, chapter 83.

An act approved February 28, 1862 (Myers' Supp., 4), contains similar provisions; so far as the jurisdiction and powers of the county court are concerned, that were contained in the act of 1819.

Under that act the case of *McAllister v. Commonwealth* (6 Bush, 581) arose. No question of the constitutionality of the act was raised; but the court, while reversing the judgment of the county court, remanded the case, with directions to correct certain specified errors, for which alone the judgment was reversed, thus recognizing, tacitly at least, the constitutionality of the provision conferring upon the county court power to assess the property of delinquents for taxation.

Whatever doubt we might otherwise have of the power of the legislature to confer upon the county court powers which are not judicial, must yield to the authority of the long continued practical construction to be found in the statute to which we have referred, and which have been acquiesced in by the bar and all departments of government for more than three quarters of a century.

Since some of these statutes were enacted, the constitution has been twice amended and re-adopted. The conventions must be presumed to have been well acquainted with the fact that these non-judicial powers had been conferred by various acts, and were being exercised by the county courts, and the re-adoption of the first article in the very words of the former constitutions was a virtual recognition of the validity of the statutes by which these powers had been, from time to time, conferred.

But the act must be held unconstitutional because its subject is not expressed in the title.

It is entitled, "An act to amend article three of chapter five of the General Statutes."

Chapter five relates exclusively to attorneys, and article three relates only to county attorneys.

The design of that provision of the constitution which requires that the subject of each act shall be expressed in the title, is to prevent the use of deceptive titles as a cover for vicious legislation, by enabling members of the general assembly to form such opinion of the nature of a bill from merely hearing it read by its title.

The title of the act under consideration can only be regarded as sufficient, even for the purpose of an amendment germane to the article mentioned in the title, by supposing the members were so well acquainted with the several chapters and the subject of each, that they could, from the simple mention of the number of the article and chapter, know the subject of that particular article.

But assuming that the title would have been sufficient, if the act had been restricted to matters germane to the article mentioned, the act must still be condemned.

The subject of the act is revenue and taxation, and not county attorneys. The duties imposed by it upon county attorneys are merely incidental to the main purpose, which was to provide additional means for the assessment of property and the collection of taxes. No one would contend that the act was valid if it were entitled "An act relating to county attorneys."

Such a title would not only fail to give even an intimation of the subject of the act, but, on the contrary, would be well calculated, though not so well as the title chosen, to

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conceal from the members of the General Assembly the real subject of the act. If the title was understood at all, the only impression it could have conveyed to the mind of the legislators was, that the act related to county attorneys, and it could by no possibility have been understood to be an act relating to the assessment of property by the county court, and the act must be held void; and as without it there is nothing to give the county court jurisdiction of the proceeding against the appellant, the court below erred in sustaining the demurrer to the petition.

Judgment reversed, and cause remanded, with directions to overrule the demurrer.

To a petition for a rehearing—

JUDGE HARGIS DELIVERED THE FOLLOWING RESPONSE:

The Code of Practice, section 479, says: "The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction."

Before the passage of the act of February 23, 1874, which is unconstitutional and void, the county court had no jurisdiction over the subject of that act; and the void act could not create any jurisdiction for the county court.

Therefore, as the county court was proceeding in a matter out of its jurisdiction, the proper remedy was by writ of prohibition.

The case of *Arnold v. Shields*, 5 Dana, sustains this view.

It is true that it is said in that case:

"If the statute be unconstitutional, that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous;" but this was said in explication of the other important point

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in that case, to-wit: That the magistrate had jurisdiction to decide whether the demands were legal or void, even if the act of 1836 were unconstitutional, or had never been enacted.

Hence, it is clear that the magistrate's jurisdiction did not *depend* upon the act of 1836; and his judgment as to its constitutionality being simply erroneous, was subject to revision by appeal only.

But the court also said:

"If the act of 1836 be unconstitutional, and therefore void; and if, also, the magistrate would not, independently of that statute, have had jurisdiction to decide on a demand for fifty dollars claimed as a penalty due from the defendants to the plaintiff in the warrant, *there could be no doubt that he would have had no jurisdiction, because his only authority would have been a void statute, which could confer no power.*"

The facts of this case, and want of jurisdiction of the county court, without the aid of the void act of February 23, 1874, bring it within the reasoning of this quotation.

Petition overruled.

CASE 4—INDICTMENT—SEPTEMBER 8, 1880.

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APPEAL FROM MARION CIRCUIT COURT.

1. A white person indicted by a grand jury composed wholly of persons of the white race, cannot complain because negroes were excluded by statute from the jury.
2. Only those who are prejudiced by an unconstitutional law can complain of it.

P. W. HARDIN, ATTORNEY GENERAL, AND THOS. A. ROBERTSON, COMMONWEALTH'S ATTORNEY, FOR APPELLANT.

1. There may be, and is, a reason for complaint upon the part of a negro that his race is denied the right to form a part of the grand jury;

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but a white man has none. He is denied no right, and the 14th amendment of the constitution of the United States gave no right to the white man that he had not before its adoption. In the case of *Johnson v. The Commonwealth* (Ky. Rep.) this court dismissed the indictment upon the sole ground that the appellant was a negro; but no right nor privilege is denied to the appellee, who is a white man.

RUSSELL & AVERITT AND S. A. RUSSELL FOR APPELLEE.

1. The objection to the indictment is, that the appellee is a white man, and the grand jury that indicted him was made up exclusively of white men, in pursuance of the statute, which we insist is in violation of the 14th amendment to the constitution of the United States.
2. This court has decided, in *Johnson v. The Commonwealth* (Ky. Rep.), that an indictment found by a grand jury composed exclusively of white men under the statute, against a negro, must be dismissed. The same rule applies to a white man.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

In *Johnson v. Commonwealth* we held, in pursuance of authoritative decisions of the Supreme Court of the United States, that a state law which excluded negroes from service on grand and traverse juries would, if enforced, deprive colored persons of the equal protection of the law, and that such statute was therefore unconstitutional. We are now called upon to decide whether that statute deprives white persons of the equal protection of the law. In other words, whether a white person indicted by a grand jury composed wholly of persons of the white race, can complain because negroes were excluded from the grand jury by which he was indicted.

Only those who are prejudiced by an unconstitutional law can complain of it. (Cooley's Const. Lim., 164.)

In *Marshall v. Donovan* (10 Bush, 681), Marshall, a white person, undertook to raise the question whether the exclusion of negroes from participation in the benefits of the common school system of the state was not a violation of the state constitution. But the court refused to consider the

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question because Marshall, being one of the favored race or class, could not raise it.

The act of the general assembly which provided that only white persons should serve upon juries has been held to be unconstitutional, because, in the opinion of the supreme court, the exclusion of negroes from juries on account of their race or color denied them the equal protection of the law in contravention of the fourteenth article of amendments to the constitution of the United States. That conclusion was based on the ground that a race whose members are excluded from serving on juries is discriminated against as a race, and is not as well protected by the law as the race not so excluded.

Surely, if this be true, it cannot be true that one belonging to the race not excluded, but from which the whole jury was required to be selected, can have been prejudiced by the fact that another race was excluded.

Wherefore, the judgment is reversed, and the cause is remanded for further proper proceedings.

CASE 5—EQUITY—SEPTEMBER 15, 1880.

Smith v. McMeekin.

APPEAL FROM SCOTT COURT OF COMMON PLEAS.

1. When a road case is taken to the circuit or common pleas court, it is an appeal upon the law and facts originating and heard in the county court, and no evidence can be heard other than that found in the bill of exceptions.
2. Original jurisdiction in road cases is in the county court. The appellate jurisdiction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired in the county court, and the action of the court below must appear by a bill of exceptions.

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J. E. CANTRILL AND GEO. E. PREWITT FOR APPELLANT.

1. The court erred in ruling that, on appeal from the county court in a road case, it should be tried *de novo*.
2. We maintain that the appeal was strictly an appeal from a lower to a higher court, and in no sense is it an original case in the common pleas court. No new evidence can be introduced upon the appeal. (Helm v. Short, 7 Bush, 624; Mitchell v. Bond, 11 *Ib.*, 616; Campbell v. Wood, 339; secs. 5, 6, 8, and 9, art. 1, chap. 94, Gen. Stat.)

W. S. DARNABY FOR APPELLEE.

1. The universal position has been, in appeals from the county court to the circuit court in road cases, to hear the case *de novo*.
2. The language of the statute is almost verbatim the same as that used in regulating appeals in will cases. (Sec. 27, chap. 113, Gen. Stat.; Barr & Yeiser v. Stephens, 1 Bibb, 293.)
3. The trial is always *de novo* in appeals from one inferior court to another.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant instituted proceedings in the Scott county court to enable him to erect three gates across the public road leading from Russell's school-house to the Georgetown and Paris turnpike. The appellee interposed his objection to the granting of such a right, and the court on the hearing authorized the gates to be erected, from which an appeal was taken by the appellee to the court of common pleas, and that court, after hearing the case, remanded it back to the county court, with directions to dismiss the appellant's application, from which judgment the appellant has appealed to this court. The principal objection to the action of the common pleas court is, that the latter court heard the case *de novo*, and in the same manner that appeals are heard when taken from quarterly and justice's courts. We think the objection is well taken. This court, in the case of Helm v. Short, reported in 7th Bush, determined that the jurisdiction of the circuit court was appellate only, and reversed the judgment below. While the sections of the Civil Code then in force, regulating appeals in such cases,

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are omitted from the present code, still the Revised Statutes contained the same provision on the subject that is found in the General Statutes. The 43d section of the General Statutes, regulating appeals in road cases, provides that "the party aggrieved may prosecute an appeal within one year to the circuit court of the county, which court shall have jurisdiction without a jury to try the law and facts of the case." With this same provision in the Revised Statutes, the court held that no original evidence could be heard by the circuit court on the trial of the appeal. In the case of Mitchell v. Hord, from the Carroll circuit, arising under the General Statutes, and reported in 11th Bush, it was held that the county court had no power, after the case had been decided and an appeal prayed, to amend the bill of exceptions at a subsequent term, thereby determining in effect that a bill of exceptions was necessary to enable the party to prosecute an appeal.

In road cases the parties in the circuit court are not entitled to a jury, while in cases of wills this right cannot be denied them by the court; and while they may waive the right, it is further provided, "that the Court of Appeals shall not hear any matter of fact pertaining thereto other than *such as may be certified from the circuit court*, clearly implying that the circuit judge may hear original testimony in cases of wills; and the fact that the parties may have a jury in such cases is conclusive of the question. When a road case is taken to the circuit court, it is an appeal upon the law and the facts originating in the county court, and no evidence can be heard other than that found in the bill of exceptions. Original jurisdiction in road cases belongs exclusively to the county court, and the appellate juris-

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diction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired below.

The judgment is therefore reversed, and cause remanded, with directions, in the absence of a bill of exceptions, to dismiss the appeal.

To a petition for rehearing—

JUDGE PRYOR DELIVERED THE FOLLOWING RESPONSE:

Upon a reconsideration of the question involved in this appeal, and after a careful reading of the history of such proceedings found in the petition for a rehearing by the appellant, we are still satisfied the jurisdiction of the circuit court is appellate only. It has no original jurisdiction in such cases, and when authorized to try the law and facts of the case, the facts heard in the court below, and no other, can be tried by the circuit court. To determine otherwise would be to rob the county court of a jurisdiction that should necessarily belong to it, by reason of the control that court has over all the public highways of the county. The judge is presumed to know the wants of the people, the necessity for establishing a highway, and the conveniences and inconveniences resulting from such action.

His own view, aided by his knowledge of the county, and the necessity for opening or discontinuing public ways, no doubt often influences his mind in determining the effect of the testimony before him. The general supervisory power that court has over the highways of the county should not be transferred to any other judicial tribunal, unless by express legislative enactment; and when a party prosecutes an appeal from a judgment of the county court in this class of cases, it should be upon the record alone as made up and passed on by the county court. If otherwise, the applicant

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has only to make the application upon proper notice in the county court, and without introducing any testimony, prosecute his appeal to the circuit court if adverse; and so of the defense, amounting, in fact, to a transfer of this original jurisdiction to the circuit court if the case is to be heard *de novo*. Such was not the intention of the law-making power, nor should such a construction be allowed to prevail.

We are aware that the practice has been different in some portions of the State, and that manuscript opinions may be found in this court where the record shows the case had been tried *de novo* in the circuit court; but in these cases the question was not raised, while in *Short v. Helm* the question was made directly in the court below, and there argued and passed upon in an opinion by the circuit judge, the substance of which, on that branch of the case, was approved and affirmed by this court. The court then declined to try the case, except on the facts appearing by the bill of exceptions, and remanded the case for the reason that the jurisdiction was appellate only. As said by this court in *Short v. Helm*, the circuit court will not be allowed to usurp the jurisdiction of the county court, and undertake to afford litigants the relief to which they are alone entitled in the county court. The errors of the county court, if any, may be revised by the circuit court, and the county court compelled to correct them.

Petition overruled.

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CASE 6—EQUITY—SEPTEMBER 29, 1880.

Bidwell v. Robinson & Wallace.

APPEAL FROM KENTON CHANCERY COURT.

1. That a *feme covert*, upon the petition of her husband and herself, is "authorized and invested with power to sue and be sued, contract and manage, sell, convey, and dispose by will, any property now owned by her, or which she may hereafter acquire, either in real estate, personal property, or choses in action," confers no power upon her to contract so as to make herself liable as the surety of her husband or of others.
2. This court will not, by implication, enlarge the power thus given to the *feme covert* by speculating upon the intention of the chancellor who rendered the judgment.
3. Under the law of Louisiana, a contract made by a married woman with the authority of the husband, for the benefit of another, is binding upon her, but she cannot be held bound for the debt of the husband, nor can she, conjointly with him, be bound for debts contracted by him before or during the marriage.
4. There is no evidence of any law of the State of New York holding a married woman bound as surety for the debt of her husband, unless the disability be in some way removed.
5. There is nothing in the case to authorize this court to hold appellee liable for the debts created in Louisiana or New York.
6. Upon the appeal against Wallace there is no error that will invalidate the sale of Mrs. Robinson's land to pay the debts due him.

J. F. & C. H. FISK AND R. SHACKLEFORD FOR APPELLANT BIDWELL.

1. The money sought to be recovered inured to the benefit of Mrs. Robinson. She was separated, as to property, from her husband by the judgment of a court. She had seven horses and a buffalo with the circus.
2. According to the law of New York, whenever a *feme covert* may be sued as a *feme sole*, they are sued in the same manner, and the same proceedings are had as if they were not *covert*. (Acts 1860, 1862, N. Y.; sec. 114, New York Code; 21 Howard's Pr. Rep., 312; 24 *Id.*, 32; 58 Barb., 620; 3 Lansing, 126; 1 Hern, 714.)
3. The court correctly held that Mrs. Robinson was bound, under the law of Louisiana, upon the three notes executed to appellant in that state. Under the law of that state, she had the power to bind herself for the payment of these notes, having been empowered to act and trade as a *feme sole* by the court of her domicile. (1 La.

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Rep., 312; Civil Code 1870, art. 1782, 1775, 1783, 1776, 1786, 1779, 2398, 2412, 2399, 2369, 2402, 2371, 2404, 2373, 2405, 2374, 2409, 2378, 2410, 2379, and 2409; art. 131, 128, Civil Code 1870, 2315, 2294, 2383, 2360, 2384, 2361; 2d Annual Report, 440; 5 *Ib.*, 125; 8 *Ib.*, 512; 14 *Ib.*, 190; 3 Robinson's La. Rep., 329; 17 Annual, 113; 6 *Ib.*, 57; 7 *Ib.*, 293; 10 *Ib.*, 433; 14 *Ib.*, 169; 5 Martin, 196; 6 *Ib.*, 518; 7 *Ib.*, 9, 368, 498; 4 La., 467.)

4. We insist that the decree of the Kenton chancery court gives Mrs. Robinson the power to contract and be contracted with as a *feme sole*. Besides, her estate is separate from her husband. (Rev. Stat., 28; 13 B. Mon., 385; 7 *Ib.*, 293; 16 *Ib.*, 376; *Ib.*, 486; Acts 1867-'8, vol. 1, p. 5; Gen. Stat., 532; 15 B. Mon., 327; 7 Bush, 467; Myers' Supp., 728, 741; 2 Met., 238; *Ib.*, 506; 8 Bush, 177; 14 *Ib.*, 553; 2 Roper on Property, 235; Parsons on Contracts and Bills, 579; Bayley on Bills, 245; Story on Promissory Notes, 315; 1 La., 312.)

W. W. CLEARY, JNO. E. HAMILTON, AND W. LINDSAY FOR MRS. ROBINSON.

1. The power to contract was not given to appellee by the judgment of the Kenton chancery court. She can sell and convey property, but cannot bind herself by a promissory note.
2. The law of another state must be pleaded as a fact. (*Root v. Meriwether*, 8 Bush, 397.)
3. There is no proof tending to show that, when the Nathen note was executed, Mrs. Robinson was transacting business in New York as a *feme sole*.
4. The proof is, that this note evidenced the debt of James Robinson and F. Pastor.
5. Under the law of Louisiana, Mrs. Robinson cannot be held bound for the debt of her husband.
6. The husband must empower her to contract. (Art. 122, Civil Code, La.; art. 123, 226, 127, 2383, 2337, 2349, 2402, 1786, 2398; 19th Annual Rep., 48.)
7. If Mrs. Robinson was interested in the circus adventure, then it was a "community debt," "to be acquitted out of the common fund," and not out of the separate estate of the wife. (Civil Code La., 2402, 2403.)

C. G. WALLACE FOR APPELLEE.

1. The appellant's assignment of errors are too general, and this court will refuse to consider them. (*O'Reagan v. O'Sullivan*, 14 Bush, 184.)
2. If the errors are properly assigned, they are totally unsustained by the record.

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Laura F. Robinson, the wife of James Robinson, executed three several notes, amounting in the aggregate to twenty-five hundred dollars, to the appellant, D. Bidwell, upon which the present action was instituted, and an attachment obtained and levied, by virtue of which the appellant sought to subject the real and personal estate owned and possessed by her in the city of Covington.

The notes were dated "New Orleans, January 10th, 1873," and payable in sixty and ninety days to the appellant, who was at the time a resident of that city, and being payable to her order, were also indorsed by her as well as by her husband, and one Frank Pastor.

An action was also instituted against her on an open account, amounting to six or seven hundred dollars, and during the progress of the litigation an amended petition was filed, in which the appellant alleges that he is the owner of a note executed by the said Laura, James Robinson (the husband), and Frank Pastor, jointly, to one Nathen, for the sum of one thousand five hundred and eighty dollars; that this note was executed and delivered by the parties to the original payee in the city of New York, where the said Laura was transacting business, and had the power to bind herself and her separate estate for the payment of the debt.

The chancellor, through his commissioner, took possession of the real estate of Mrs. Robinson, and rented it out during the pendency of the action, and upon the final hearing refused to subject her real estate to the payment of the several claims, but held that her personal estate was liable, and subjected the same accordingly.

The appellant, Bidwell, appeals from the judgment, and the appellee, Mrs. Robinson, prays a cross-appeal, and

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insists that she is not responsible for the debts of her husband by reason of any of the obligations signed by her.

It is conceded that the appellee was a married woman at the date of the execution of the several notes declared on, and she is sought to be held liable, first, because by a proceeding in the Kenton chancery court, under the act of February 14th, 1866, she was authorized to contract as a *feme sole*; and secondly, that by the laws of Louisiana and New York, where the obligations or notes were executed and delivered, and where the payees at the time lived, a *feme covert* was authorized to make such contracts, and to bind her estate for the payment.

A demurrer was filed by the appellees to the petition, upon the ground that the laws of the two states, under which the feme is attempted to be made liable, are not set forth *in haec verba* or the substance given. This court, in the case of *Roots v. Meriwether*, reported in 8th Bush, determined that the law of another state must be pleaded as any other fact, and with such distinctness as would enable the court to pass on the effect of the law. Various amendments were filed in this case, but whether with a view to cure this defect does not certainly appear; and although the pleading may be regarded as defective, as the case can be finally disposed of, we will pass from the consideration of that question to its merits.

The question first to be determined is: "Had Mrs. Robinson the power to contract by reason of the judgment of the Kenton chancery court, rendered under the act of February, 1866." That enactment is embodied in the General Statutes, and authorizes the chancellor, on the petition of the husband and wife, or when the husband is a defendant, upon a proper state of case, to empower the wife "to

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use, enjoy, sell and convey, for her own benefit, any property she may own or acquire, free from the claims or debts of her husband; or to make *contracts, sue and be sued*, as a single woman, or trade in her own name, or dispose of her property by will or deed, &c., *either one or more or all of the powers herein enumerated may be granted*; but in all cases the wife's property shall be liable for her debts, contracts, and liabilities."

On the joint petition of the husband and wife, Mrs. Robinson was "authorized and invested with power to sue and be sued, control and manage, sell and convey, dispose of by will or otherwise, any property now owned by her, or which she may after acquire, either in real estate, personal property, or choses in action."

The power given the *feme* by this judgment confers upon her no right to contract so as to make herself liable as the surety of her husband or as the surety of others; but, on the contrary, she is limited in the exercise of the power conferred to the acquisition and disposal of property in her own right, whether real or personal, such as she then owned or might thereafter acquire. The right to *sue and be sued*, while it would ordinarily imply the right to contract with reference to any matter the subject of a contract, must be held to be limited in its meaning in this case, when, in permitting the wife to sue and be sued, the chancellor has restricted her, in the exercise of the power conferred, to the control and management of her estate, with the right to acquire and dispose of the same as if she was a *feme sole*. The right to sue and be sued is to enable her to exercise the power conferred, and not to contract with reference to matters in which she has no interest, and from which she

can derive no benefit. The general power to contract and be contracted with has been withheld by the chancellor under that clause of the statute by which he is authorized to vest in the *feme covert* "*either one or more or all the powers herein enumerated.*" This court will not, by implication, enlarge the powers of the *feme covert* by speculating upon what might have been the intention of the chancellor when entering his judgment.

He is given the discretion to limit the rights of the wife as to the exercise of the powers conferred by the act; and this court would be reluctant to hold the wife liable for the contracts or debts of the husband, unless the intention of the chancellor is so manifest as to leave but little doubt as to the extent of the power given. We therefore concur with the court below, that Mrs. Robinson could not, by reason of the proceedings in the Kenton chancery court, bind herself as the surety of her husband or those interested with him.

The chancellor held that, by the laws of Louisiana, the wife could bind herself for the three notes executed to the appellant, and as the notes were executed and delivered by the *feme covert* to the appellant in New Orleans, who was at the time a resident of that city, it became necessary to ascertain the liability of the appellee under the laws of Louisiana. A contract made by a married woman, with the authority of the husband, for the benefit of another, is binding upon her under the law of that state; but the wife cannot be held for the debt of the husband, the Civil Code of that state expressly prohibiting the courts from conferring on the wife the power to contract liabilities for the purpose of paying the husband's indebtedness. (Article 127, Civil Code.)

"The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for

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her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

There is no controversy, however, between the parties as to what the *lex loci* is in this case, and the trouble arises in determining whether the notes were executed for the debts of third parties, or for her own indebtedness, or on account of the indebtedness of her husband. It is alleged in the petition that the defendants, James Robinson, his wife, Laura, and Pastor, were the owners and proprietors of a circus, and that the indebtedness arose from transactions between the parties in relation to that enterprise; but the chancellor finds that the debt, or the principal part of it, was the debt of Russell, Morgan & Co., and for that reason holds the married woman bound. It does appear from the record that Robinson, Pastor, and one Prescott were at one time the owners of this circus, and being indebted to the firm of Russell, Morgan & Co., the circus and its appendages were sold to the latter firm in the year 1872.

After this sale took place, Robinson (the husband) and Pastor rented the entire circus property from Russell, Morgan & Co., at the price of \$600 per week, and entered into a contract with the appellant to exhibit in several southern cities. They were exhibiting under the management of the appellant, Bidwell, in the city of New Orleans, at the time these notes were executed, under a contract made between James Robinson and one Spalding, the agent of the appellant. Russell, Morgan & Co. had no connection with any contract made between the appellant and the defendants, Robinson and Pastor. It is not pretended that they made any contract, either in person or by an agent, and the only interest shown by the record that they asserted was the right to demand of Robinson & Pastor the \$600 per week, the

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amount of their rent; nor does it appear by any proof, except the statement of the appellant, that Mrs. Robinson had any interest in the undertaking, but, on the contrary, the decided weight of the testimony is that he had no interest, either as a partner or otherwise. The principal part of the indebtedness, according to the statement of Bidwell, was for money loaned Mrs. Robinson in the state of Georgia to enable the proprietors of the circus to reach New Orleans, and after their arrival at that place the notes were executed.

The appellant says that Mrs. Robinson told him she was a partner; but this idea is refuted by the entire proof on that subject. She was certainly not a partner of Russell, Morgan & Co., and Morgan, one of the firm, so states, and in this he is sustained by all the other witnesses, except the appellant. She owned some trained horses that were exhibited, regarded and known by all as her separate estate, and there is an entire absence of proof connecting her with the circus, so as to make her liable for the indebtedness of the company, or to assume the liabilities incurred by the husband; and in addition to all this, it is a little remarkable that the appellant, after making the contract with Robinson, and knowing that Russell, Morgan & Co. had purchased the circus, should, upon its arrival at New Orleans, regard Mrs. Robinson as the responsible partner of the firm. The appellant in his testimony states that a part of the money was advanced to Mrs. Robinson, that she might redeem some jewelry belonging to her that was at the time in pledge. This she denies, and says it was redeemed in Cincinnati long after, and gives the name of the party to whom the pledge was made. The testimony, in our opinion, is conclusive of the fact that the debts for which these notes were given

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were the joint liabilities of James Robinson and Pastor, and for which the appellee, Mrs. Robinson, cannot be held bound, either under the law of Louisiana or the law of this state.

The debt incurred in the city of New York was the debt of the company, and the wife of Robinson became the surety only. She could have created no such liability under the law of her domicile, and there is no evidence going to show that she was transacting business in the state of New York as a *feme sole*, nor any law that we have been able to find on the statute-book of the latter state holding a married woman bound as the surety for the debt of the husband unless the disability of coverture has in some way been removed. We see no reason for holding the appellee, Mrs. Robinson, liable for the claims in controversy, and the judgment must be reversed on the cross-appeal, with directions to dismiss the petition in so far as it seeks a recovery against her or to subject her estate. As to the husband, there is no judgment for or against him.

On the appeal of Laura Robinson v. Wallace we find no error that should invalidate the sale. The property was appraised and brought two thirds of its value, fixing the value at the highest estimate made by the appraisers. The judgment confirming the sale made to Wallace is affirmed, and the judgment on the appeal of Bidwell v. Wallace, in so far as it affects Wallace, is also affirmed; cause remanded for further proceedings consistent with this opinion.

The appeal as to James Robinson is dismissed without prejudice.

The following additional opinion was rendered by Judge Pryor:

On a petition for rehearing, the opinion is so modified as

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to reverse the judgment dismissing appellant Bidwell's claim against James Robinson for the account of \$635 06. There is no defense made by Robinson to this account, and on the return of the cause, a judgment should be rendered for this account, less the credit admitted by Bidwell. There is no judgment on the Louisiana notes in favor of Robinson, but only an opinion that the latter is not liable as indorser. On the return of the cause, judgment can be entered for the amount. As to Mrs. Laura Robinson, the court is satisfied she is not liable, either under the law or the facts of the case, and the petition as to her is overruled. In the original opinion it was stated that the court below had subjected the rents of the real estate of the wife to the payment of the debts. This part of the opinion has been erased on page 2, original opinion.

CASE 7—INDICTMENT—OCTOBER 1, 1880.

Herron v. The Commonwealth.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. Where an alternative punishment is denounced by the statute for an offense, the jury should be instructed and required to fix the kind and extent of the punishment, within the limits prescribed by the law.
2. It was error for the court, upon a verdict of guilty, to fix the punishment when it was in the alternative.

W. N. SWEENEY FOR APPELLANT.

1. The indictment charged appellant with setting up and keeping a faro bank.
2. The punishment is clearly in the alternative. The jury found simply a verdict of guilty.

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3. The court erred in fixing the punishment. (Subsec. 2, sec. 257, secs. 258, 259, Criminal Code.)
4. It was the province of the court to instruct the jury as to their duty, not to usurp their functions. (Bishop's Criminal Law, vol. 1, secs. 838, 842.)

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

It is provided by section six, article one, chapter forty-seven, of the General Statutes, that the penalty for setting up, exhibiting, or keeping faro banks shall be a fine of five hundred dollars and costs, and imprisonment until the same are paid, or imprisonment not more than one year, or both such fine and imprisonment, &c.

The indictment was for a violation of this section, and upon the trial, the jury, by their verdict, found the appellant "guilty as charged in the indictment."

This verdict was received, and judgment rendered thereon by the court for five hundred dollars and costs, and declaring the appellant infamous, and incapable of holding any office of honor, trust, or profit in this Commonwealth, and forever disqualified from exercising the right of suffrage.

To the reception of the verdict and rendition of the judgment the appellant objected and excepted.

By section 258 of the Criminal Code it is made the duty of the jury, in rendering verdicts of guilty, to "fix the degree of punishment to be inflicted, *unless the same be fixed by law.*"

This section means that if the law fixes the punishment, leaving no room for discretion on the part of the jury as to its kind or extent, then the law does not require them to fix the degree of punishment in their verdict.

But where an alternative or indefinite punishment is denounced by law for a given offense, there the jury must

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be instructed, allowed, and required to fix the kind and extent of the punishment within the limits prescribed by the law.

It will be observed at once that if the jury had been directed to fix the punishment in this case, they might have imprisoned the appellant without the fine which the court assessed without the imprisonment. In this class of cases the punishment is not fixed by law, and the court erred in receiving the verdict and fixing the degree of appellant's punishment.

The judgment is reversed, and cause remanded, with directions to set aside the verdict and award a new trial.

CASE 8—EQUITY—OCTOBER 6, 1880.

Moss, &c., v. Hall.

APPEAL FROM MERCER CIRCUIT COURT.

1. An infant may appeal from a judgment of the circuit court to this court at any time during his minority, although two years have elapsed since the judgment.
2. Having the right of appeal within one year after their majority, they may exercise the right at any time after the rendition of the judgment until the time mentioned.

E. J. POLK FOR APPELLANTS.

The appellants, who are infants, may appeal at any time during their minority. They can appeal within one year after they attain their majority, and, therefore, may appeal at any time previous thereto.

T. C. BELL, J. H. HARDIN, AND D. S. POSTON FOR APPELLEES.

1. Two years having elapsed since the rendition of the judgment, the right to appeal is barred.
2. It is true infants may appeal within one year after they become of age, but that time has not arrived.

MOSS, &c., v. Hall.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Section 745, Civil Code, provides, that "an appeal shall not be granted except within two years next after the right to appeal first accrued, unless the party applying therefor was then a defendant in the action, and an infant not under coverture, or of unsound mind, or a person who did not appear by attorney; in which cases an appeal may be granted to such parties, or their representatives, within one year next after their death, or the removal of their disabilities, whichever may first happen.

In this case those representing the infant defendants have failed to prosecute an appeal within two years from the date of the judgment, and this is made a defense by way of answer to the appeal by the infants. Having the right to an appeal upon their arriving at age, we see no reason why the appeal should not be allowed them at any time during their minority. They are asserting a claim to the homestead, to which they are clearly entitled, and if they are postponed by reason of the failure of the guardian *ad litem* to appeal until they arrive at the age of twenty-one years, their right to a homestead is then gone. If a recovery is had against them by a plaintiff in the court below, and no appeal taken within the two years, he may take possession of their property, real or personal, and hold it until they arrive at age, and then, it is conceded, the infant defendant may ascertain what his rights are. An infant may show cause against a judgment affecting his right within twelve months after arriving at age; still this court held, in *Moreland v. Gentry* (18 B. Mon., 666), that there was no reason why it could not be shown at any time during the infant's minority. A different construction of this section of the Code would not only prejudice the rights of infants, but render uncertain

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the interests of all parties who claim as against the infant defendants, if the latter are not allowed to prosecute an appeal until they arrive at twenty-one years of age.

It is to the interest of all parties, if there is an error in the judgment, that it should be ascertained, and their rights finally determined. The appeal by the infant would be a complete bar to any appeal after arriving at age, and it was never contemplated that such a construction should be given the statute as would postpone the settlement not only of the rights of infants, but of those litigating with them, for years after the judgment has been rendered, when the infants appear in court by those entitled to be heard for them, asking a final adjudication so important to the interest of all concerned. The order dismissing the appeal as to the infants is therefore set aside.

Judgment reversed as to the infant appellants. The appeal of Mrs. Moss has heretofore been dismissed. The cause is remanded for further proceedings.

CASE 9—INDICTMENT—OCTOBER 8, 1880.

The Commonwealth v. Williams.

APPEAL FROM GRAVES CIRCUIT COURT.

1. One who has been elected to, and engages to serve the public in an official capacity, has no right voluntarily to unfit himself for the faithful and intelligent discharge of his duties, and the law-making power may provide for his punishment in any manner not prohibited by the constitution.
2. The constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated.

79	42
e110	820
111	633

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3. Nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize the removal of an officer upon his conviction of such offense.
4. Intoxication cannot be deemed a misfeasance in office. Misfeasance in office is the wrong-doing of an official act. It relates to official conduct, not to conduct as an individual.

R. H. WILLIAMS FOR APPELLANT.

1. The state of intoxication intended by the "Act to prevent intoxication of county officers in this Commonwealth," approved April 9, 1878, is drunkenness to such a degree as to incapacitate the officer from doing his official business.
2. County judges may be removed from office for malfeasance or misfeasance in office or willful neglect of official duty. (Constitution, art. 4, sec. 36; Cooley's Const. Lim., 64; Lowe v. Commonwealth, 3 Met., 241; Brown v. Grover, 6 Bush, 1.)
3. Misfeasance is the performance of an act which might lawfully be done, but done in an improper manner, by which another receives an injury. (Bouvier's Law Dictionary.) It must relate to the official conduct, and not to the officer's conduct as an individual.
4. The act in question is unconstitutional. (Cooley's Const. Lim., 64; Lowe v. Commonwealth, 3 Met., 241; Brown v. Grover, 6 Bush, 1; Gaines v. Gaines, 9 Mon., 302.)

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

The question is, whether the act of April 9, 1878, is constitutional.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The appellee was indicted in the Graves circuit court for the offense of misfeasance in office, alleged to have been committed in manner and form as follows:

"The said R. H. Williams, on the 27th day of October, 1879, in the county aforesaid, he being judge of the county court of Graves county, duly elected and qualified as such judge, . . . was, while engaged in the performance of official duties as such judge, found to be in a state of intoxication from the use of spirituous, vinous, or malt liquors; and particularly was said Judge R. H. Williams in a state of intoxication while engaged in the discharge of official

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duties on the 20th of September, 1879, when Elisha Tom came before said county judge for the purpose of obtaining letters of administration on the estate of W. S. L. Tom, then deceased, and to execute bond as such before said judge, and to have appraisers of said estate appointed, all of which was done before said R. H. Williams as such judge on said day; and during the time of the transaction of all this official business before said judge . . . he was . . . in a state of intoxication from the use of spirituous, vinous, or malt liquors, . . . contrary to the form of the statute," &c.

The indictment was based on section 1 of an act, entitled "*An act to prevent intoxication of county officers in this Commonwealth,*" approved April 9, 1878 (*Acts 1878, vol. 1, page 126*).

That section reads as follows:

"That it shall be deemed misfeasance in office for the judge of any county court, justice of the peace, sheriff, coroner, surveyor, county assessor, attorney for a county, constable, police judge, marshal, or clerk of any chancery or police court, while engaged in, or by law required to be engaged in, the discharge of his official duties, to be in a state of intoxication, produced by the use of malt, vinous, or spirituous liquors."

The only penalty denounced by the statute is removal from office.

We entertain no doubt that the General Assembly possesses ample power to punish public officers of all grades for being voluntarily in a state of intoxication while engaged in, or when required by law to be engaged in, the discharge of official duties.

One who engages to serve the public in an official capacity has no right, voluntarily, to unfit himself to any degree

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for the faithful and intelligent discharge of the duties of his position; and the law-making power of the state may punish him for so doing in any manner not prohibited by the constitution.

But the constitution has designated the offenses for which certain public officers may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated; nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize or require the removal of an officer upon conviction of such offense. The constitution is in such a case a criminal statute, and having designated certain offenses for which certain named public officers may be removed from office, is equivalent to a declaration that the designated officers shall not be removed from office for any offense other than those enumerated.

Section 36, article 4, of the constitution, provides that—

“Judges of the county court, and justices of the peace, sheriffs, coroners, surveyors, jailers, county assessors, attorney for the county, and constables, shall be subject to indictment or presentment for malfeasance or misfeasance in office, or willful neglect of their official duties, in such mode as may be prescribed by law, subject to appeal to the Court of Appeals, and upon conviction their offices shall become vacant.”

The phrase “misfeasance in office” had, at the time of the adoption of the constitution, a definite and well understood legal meaning. It described an offense which consisted in the wrong-doing of an official act. It embraced this single offense and no more, and it is for the courts and not the legislature to decide what acts constitute the offense de-

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nounced by the constitution; and if being in a state of intoxication, under the circumstances mentioned in the statute under which the appellee was indicted, did not constitute the offense of misfeasance in office, without the aid of the statute, the statute is unconstitutional as to such of the officers named in it as are also named in section 36, article 4, of the constitution.

If being in a state of intoxication is to be deemed misfeasance in office because the legislature has so declared, although it is not misfeasance without such declaration, then the legislature may, by declaring that any violation of the criminal or penal laws of the state shall be deemed misfeasance in office, make all the public officers mentioned in section 36, article 4, removable from office upon indictment and conviction of any offense whatever.

The constitution denounces against these officers the penalty of removal for the offense of misfeasance in office, and this is an implied limitation upon the power of the legislature to extend the penalty to other cases.

Mr. Cooley says "that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases." (Const. Lim., page 78, 4th ed.)

And this court said in *Lowe v. Commonwealth* (3 Met., 241), "that wherever the constitution has created an office and fixed its term, and has also declared upon what grounds and in what mode an incumbent of such office may be removed before the expiration of his term, it is beyond the power of the legislature to remove or suspend him from

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office for any other reason or in any other mode than the constitution itself has furnished."

This doctrine was approved in *Brown v. Grover* (6 Bush, 1), and has been followed in many unreported cases since that time.

It only remains then to decide whether, if a public officer be in a state of intoxication while engaged in, or when by law he is required to be engaged in, the discharge of official duties, he is guilty of misfeasance in office within the meaning of the constitution.

Bouvier defines misfeasance to be the performance of an act, which might be lawfully done, in an improper manner, by which another person receives an injury; and misfeasance in office would, therefore, seem to be the improper doing of an official act.

The second constitution of this state provided that clerks should be removable from office by the Court of Appeals "for breach of good behavior."

In proceedings under that provision, this court held that the inquiry must be confined to misconduct in office, and that conduct, however immoral, which did not relate to the official action of the clerk, constituted no ground for his removal. (*Commonwealth v. Barry*, Hardin 238; *Commonwealth v. Chambers*, 1 J. J. Mar., 160.)

In the latter case, the court said, it was "proper to separate the character of the man from the character of the officer," and that it had "no power to remove a clerk for crimes committed so long as he discharged the duties of his office well." In this case, no complaint is made that the appellee did not faithfully, honestly, and correctly discharge all his duties as an officer. There was, therefore, no misconduct as an officer on his part, however reprehensible his

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conduct as an individual may have been. It is only for misconduct in connection with his official duties that the constitution authorizes him to be removed from office upon an indictment, and as the only misconduct charged was individual and personal, and not official in its character, the judgment must be affirmed.

CASE 10—ORDINARY—OCTOBER 16, 1880.

Bell v. Norris.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. The remedy given by chap. 66, art. 2, sec. 26, Gen., Stat., is cumulative, and it is within the discretion of the party whose property has been wrongfully distrained by his landlord to declare under the statute, or pursue his remedy at common law.
2. The double damages, or double the value of the property sold, provided for in this section, is in the nature of a penalty.
3. If the plaintiff seeks to recover double damages for the wrongful seizure of his property, or double the value of his property wrongfully sold under a distress warrant, he must distinctly declare *under the statute*. He must recite the statute, or conclude to the damage of the plaintiff contrary to the form of the statute.

LITTLE & SLACK FOR APPELLANT.

1. The instruction given was erroneous. It ignores the facts, and does not contain the law.
2. The direction to the jury to give double damages and double the value of the property, if it was wrongfully sold, was error.
3. The statute, chap. 66, art. 2, sec. 26, is highly penal, and to obtain the benefit of it, appellee should have declared under the statute, and not have asserted his common law right of recovery, as he did in his petition.
4. The nature and amount of damages prayed limit the amount of recovery. (54 Mo., 58; *Ib.*, 225; 6 Central Law Journal, 115; Adams Express Co. v. Milton, 11 Bush, 50; 5 Cal., 239.)

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W. N. SWEENEY & SON FOR APPELLEE.

1. The answer admits that the land was rented for the year 1878. In the absence of a contract fixing the term, the law fixes it at one year.
2. The instruction given was less favorable to the appellee than the law authorized.
3. The suit is brought under chap. 66, art. 2, sec. 26, Gen. Stat.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This was an action by Bell v. Norris to recover damages on account of the illegal issue of a distress warrant, and the sale of the appellee's property under it before the rent became due.

It is alleged that the appellant caused the sheriff, or other officer, to levy upon and sell 450 bushels of wheat belonging to the appellee, worth 80 cents per bushel, amounting in all to \$360; that he was preparing to have it threshed, but was prevented by the wrongful distress, seisin, and sale of the wheat by the appellant; and that he was damaged in the sum of \$720, and for which he asks a judgment. On the trial of the case, there being no positive proof as to when the rent was payable, the testimony conducing to show that the land was rented by the appellee to be sown in wheat, the court instructed the jury that they should regard it as a renting from year to year, the rent to become due and payable at the expiration of the term. This, we think, was proper, and certainly could not have prejudiced the substantial rights of the appellant if erroneous. The warrant was levied on the wheat as soon as it was harvested, and while in the shock; and although there was some testimony tending to show that the rent was due when the wheat was threshed and sold, still, in either state of case, the levy and sale was wrongful, and the right of recovery undoubted.

The court instructed the jury to find double the value of

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the wheat sold, basing this view of the case on the 26th section of article 2, chapter 66, General Statutes, which provides: "If property be distrained for any rent not due, the owner of the property may, in an action against the party suing out the warrant of distress or attachment, recover double damages for the wrongful seizure; and if the property be sold, double the value thereof. This remedy is merely cumulative, and it is within the discretion of the party injured to declare under the statute, or pursue his common law right. The double damages or double the value of the property to be assessed in such cases is in the nature of a penalty, and if the plaintiff seeks to confine his recovery to the amount fixed by the statute, he must allege his right to recover by reason of the statute. In this case, if the facts alleged are true, the plaintiff is not confined to the mere value of his wheat, but is entitled to recover for the unlawful entry and seizure of his property. It is true that, under the statute, he may recover double damages for the unlawful seizure, and whether that is to be interpreted as meaning double the amount of damage for the actual injury sustained, or damages by way of punishment, is immaterial. It is certain that this case belongs to a class of cases in which, at common law, something more might be recovered than the mere value of the property taken, and having adopted the common law remedy, the rule of the common law as to the quantum of recovery must apply.

If there was an unlawful entry on the premises of the appellee, and a seizure of his property, as is alleged in the petition, an instruction based on the idea that he was not confined in his recovery to the actual value of the property taken, but was entitled to exemplary damages for the un-

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lawful entry, &c., would have been proper; and if he is also entitled to the instruction given by the court below, it would be at the plaintiff's option to elect whether he would take his damages at common law or under the statute. Such is not the law. If the proceeding is for the penalty fixed by the statute, the facts must not only be alleged, bringing the case within the statute, but the plaintiff must claim double damages by reason of the statute, and then the defendant is notified of the extent of the plaintiff's demand.

This being a common law action, and the jury finding the defendant guilty, might have returned a verdict for a less amount than double the value of the property; but when told that the statute regulated the amount of the finding, and the jury believing the defendant guilty, there was no other alternative under the instructions than to assess damages for double the value of the property sold. This is a highly penal statute; the wrong-doer is liable "to double damages for the wrongful seizure, and, if the property be sold, for double the value thereof," and in seeking such a recovery the pleader must declare upon the statute. The demand for such damages must recite the statute, or conclude to the damage of the plaintiff contrary to the form of the statute. (*Chipman v. Eunice*, 5 California, 239; *Newcomb v. Butterfield*, 8 Johnson's Reports, 343.)

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

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CASE 11—EQUITY—OCTOBER 16, 1880.

Elizabethtown and Paducah R. R. Co. v. Thompson, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. When land is laid off into lots, streets, and alleys, and lots are sold, each lot-owner has the right not only to use the streets as ways of ingress and egress, but also to have them thrown open to be used by the public in any manner consistent with the uses for which they are established.
2. The occupation and use of the street of a city or town as the site of a steam railroad, does not entitle owners of the fee adjacent thereto to the center of the street to compensation, as for property taken for public uses.
3. The report of the commissioners as to consequential damages will not be disturbed.
4. The court erred in awarding the writ of *habere facias* against the appellants.

H. C. PINDELL FOR APPELLANTS.

1. That part of the judgment brought into question by the cross-appeal is right. (Rowan's heirs v. Portland, 8 B. Mon., 237; Wickliffe v. Lexington, 11 *Ib.*, 163.)
2. Appellees are entitled to no compensation on account of the construction and operation of appellee's road in the street. (Cosby v. O. & R. R. Co., 10 Bush, 291; Angell on Highways, 7.)
3. The exceptions to the commissioners' report should have been sustained. (Hord v. Lee, 5 Mon., 65; Bell v. Barrett, 6 J. J. Mar., 520; Cook v. Redman, 2 Bush, 53; 2 B. & Ad., 341; 9 Ad. & Ellis, 463; 4 B. & Ad., 592.)
4. There should have been no judgment for consequential damages. (Heywood v. Mayor, 7 N. Y., 314; Angell on Highways, sec. 311; Cooley's Con. Lim., 558.)
5. The court erred in reserving to itself in the judgment the right to enforce it by issuing a writ of *habere facias*, to put the appellees in possession.

JAMES SPEED FOR APPELLEES.

1. The street is private, not public property. Appellants bought their lot upon the street, not to use it for ordinary purposes, but to open the way for their railroad. This is not the use of their powers under their charter in good faith.

79	52
110	700

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2. Appellants cannot, as lot-owners, lay down its road over the street, whether it be public or private, without authority from the title-holders. (Lex. & Ohio R. R. Co. v. Applegate, 8 Dana, 289; Rowan's ex'r v. Portland, 8 B. Mon., 232; Wickliffe v. Lexington, 11 B. Mon., 155; Wolfe v. Cov. & Lex. R. R. Co., 15 *Ib.*, 407; 17 *Ib.*, 763; Gal-loway v. City of London, 16 I. N. C.; Webb, &c., v. Manchester & L. R. R. Co., 4 M. & C., 116; 11 Peters, 535; 11 Jurist, 406.)
3. The position of appellants' counsel, that damages can never be given until it is embraced by the city boundary, is somewhat queer. It may never be so embraced, and thus the claim to damages would be destroyed.

8. S. MYERS FOR APPELLEES.

1. Laying out lands into streets, alleys, and lots, with reference to a plan, constitutes a dedication.
2. Such streets and alleys are established not only for the public but for the special convenience of all those who may have purchased adjacent lots.
3. Private property cannot be taken for public use without compensation. (8 Dana, 290; 8 B. Mon., 232; 11 *Ib.*, 155; L. & F. R. R. Co. v. Brown, 17 B. M., 746; 8 *Ib.*, 236; 13 Bush, 637.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The heirs of Alfred Thompson owned a tract of about forty-five acres of land adjoining the southern boundary of the city of Louisville. Commissioners appointed to make partition between them, reported that, considering the land more valuable as town lots than for agricultural purposes, they had made a plat for its partition, upon which Thirteenth, Fourteenth, Fifteenth, and Sixteenth streets of the city, which abutted against the land, were extended through it. Other streets were laid down, and the land divided into squares and lots of the usual size of squares and lots in the city; and they made the partition by assigning certain of the lots to each of the heirs. The report was approved, and deeds of partition duly executed. Some of the lots were sold, and two of them fronting on Fourteenth street, after passing through several owners, were purchased by and conveyed to the appellant. Except these lots, all the lots front-

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ing on Fourteenth street are now held by the appellees under the partition deed, and are used by them or their tenants for gardening purposes, and until thrown open under a judgment in this case, the strip of land designated on the partition plat as Fourteenth street was inclosed with the lots.

The appellant having legislative authority to extend its road to the city of Louisville, located the extension over the land designated on the plat as Fourteenth street, which, for convenience, we will hereafter call by the name of the street.

The appellant claimed that as the owner of a lot in the tract, and abutting on Fourteenth street, it had a right to have the street thrown open, to be used by the public; and that it then had a right to construct its road along the street without making compensation to those owning lots thereon, either for the occupation of the street or for consequential injury to the adjacent property. The appellees claimed that they were entitled to compensation for the right of way along the street, and for consequential injury to the adjacent lots.

In order to settle these conflicting claims, the parties made an agreed case.

In the agreement it was provided that if the court should be of the opinion that the appellees are entitled to compensation, the amount should be ascertained by three commissioners to be appointed by it, and to act under its instruction; that either party might except to the report of the commissioners; and that unless the amount adjudged should be paid, the court might enjoin the use of the right of way until payment was made.

The court decided that the street should be opened, but that the appellees were entitled to compensation for the

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right of way in the street, and the incidental damage to the lots resulting from the occupation of the street by the track. The commissioners reported, and, on final hearing, the court adjudged that the appellant should pay to the lot-owners, respectively, the amount of compensation fixed by the commissioners. The appellant failing to pay as directed, the court enjoined it from using the track in Fourteenth street, and on the motion of appellees, awarded a *habere facias* to put the appellees in possession of the street.

From so much of the judgment as gives the appellees compensation, and the order awarding the *habere facias*, the appellant has appealed, and the appellees prosecute a cross-appeal to reverse so much of the judgment as directs the street to be opened.

Taking up the questions presented in their logical order, we will first dispose of the question raised by the cross-appeal.

For the appellees it is contended that this part of Fourteenth street, being outside the corporate limits of the city, and consequently never accepted by the municipal or any other legal authority, it has not become a public highway.

This is true in a qualified sense. The public has a right to use the street when opened as long as it continues open. But no authority acting for the public having accepted it as a highway, the right of the public to use it as such is subject to be defeated whenever all the owners of the abutting land shall agree to close it. But it is well settled that when land is laid off into lots, streets, and alleys, and lots are sold, each lot-owner has a right, not only to use the streets as ways of ingress and egress, but to have them thrown open, to be used by the public in any manner not inconsistent with the uses for which streets are established.

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In *Rowan's heirs v. Portland* (8 B. Mon., 232), Chief Justice Marshall, speaking for the court, said:

"The right which, as we suppose, passes to the purchasers of lots as appurtenant thereto, is not the mere right or privilege that each purchaser may use the streets and other public places according to their appropriate purposes; but the right acquired by each purchaser is, that all persons whatever, as their occasions may require or invite, may so use them; or, in other words, we suppose the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places indicated as such upon the plan shall be forever open to the use of the public, free from claim or interference of the proprietor inconsistent with that use. It is not necessary, therefore, to presume or imagine a grant to the public in order to ascertain the right of use in the public; nor is it necessary to assume that there may be a grant without a grantor, or to say that the title may remain in abeyance until there is a grantee capable of taking."

And in *Wickliffe v. City of Lexington* (11 B. Mon., 155), the court, per Judge Simpson, used this language:

"Nor can it be doubted that every purchaser of a lot acquired an interest in the streets, not only as an evidence of the position of his purchase, but also as a medium of communication that increased the value of his property and afforded all the advantages and facilities that might be derived from their use as public thoroughfares. And this right acquired by the purchasers of lots was not the mere privilege of using the streets themselves, but a right to have them kept open to the use of the public, free from all claim or interference of the proprietor inconsistent with that use." (*Rowan's ex'rs v. Town of Portland*, 8 B. Monroe, 237.)

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And again :

"The fact that the alleged title to some of the streets has not been conveyed by the proprietor to the trustees of the town cannot impair the right of the purchasers or their grantees, or the public at large. If the dedication did not *per se* operate to transfer the title to the trustees of the town, still the proprietor held it as a trustee, subject to this public use, and was as much bound to maintain it and preserve it from all disturbance or diminution as public trustees would have been." (Rowan's ex'rs v. Town of Portland, *supra*.)

We are, for these reasons, of the opinion that the appellant, as owner of lots within the territory laid out into streets and lots in the partition already referred to, has a right to have the street opened, and kept open.

It is contended, however, that the appellant has no right to own and hold the lots conveyed to it, and therefore no right to require the street to be opened.

Its charter declares, that "it shall be capable of purchasing, holding, selling, leasing, and conveying real estate not exceeding ten thousand acres, and personal estate so far as the same may be necessary for the purposes of the corporation."

The appellees contend that under the rule that grants to private corporations are to be strictly construed, that this provision is not to be taken to authorize the appellant to purchase and hold land except such as may be necessary for corporate purposes, and that as it does not appear that the lots in question are necessary for such purposes, it has failed to manifest any right as lot-owner. Waiving the inquiry whether the appellant's right to acquire and hold the title can be thus raised, and also the question as to the

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extent of its right to hold land, we are of the opinion that having an unquestioned right to acquire and hold such real estate as may be necessary for corporate purposes, and the lots in question being adjacent to its track within a short distance of its terminus, we ought to assume that it is held for legitimate uses. The burden was on the appellees to show that the lots were not such as it could lawfully hold.

We are, therefore, of the opinion that the judgment ordering the street to be opened should be affirmed.

2. It must now be regarded as the settled law of this state, that the occupation and use of the streets of a town or city, as the site of a steam railroad, does not entitle adjacent proprietors who own the fee to the center of the street to compensation as for property taken for public use.

• But while this is true, it is also true that the very decided weight of authority in the United States is against the rule established here, and that there are very many weighty reasons against it. And while we entertain no thought of receding from a doctrine so well established by our learned predecessors, we are not disposed to extend the rule to cases differing materially from those to which it has already been applied.

This case does not fall within the rule. Fourteenth street, outside of the corporate limits, is yet private property. The public has no easement in it. The easement is in the lot-owners; and whatever use the public may make of it is based solely on the private right of the lot-owners, and may be terminated by their unanimous voice at any moment. In streets within the corporate limits, which have been accepted by public authority, the rule is different. There the easement is in the public, and the use of the street for a steam railroad track is held to be a legitimate use of the

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easement; and the rule that such use of the street is not a new servitude rests upon that ground, and upon that alone. In this case the reason fails, and rule based upon it must also fail.

The appellant's only right in the street or its use is as lot-owner. It has no right not possessed by every other person owning a lot on the street. It cannot have any right derived from or through the public, because the public itself has no right to the street or to its use.

3. The appellant claimed in the court below to have the value of the use, until such time as the city limits will be so extended as to include that part of Fourteenth street within the corporation, ascertained; but the court refused to attempt to make such an estimate, and we think properly.

In the first place, such an estimate seems to be wholly impracticable, and in the second place, the appellant has no right to assume that when the city limits are extended, Fourteenth street, now outside, will remain in such condition that the public authorities will have a right to accept it, and thus make it an ordinary public street.

Moreover, this proceeding is for the purpose of depriving citizens of their property without their consent, and in such cases the courts have no right to indulge in vague and uncertain speculations as to the future. The estimate must be made in view of the situation and circumstances existing at the time, and ought not to be affected by anticipating future events, which may never happen.

We will not say if the appellant had sought to acquire the use for a specified time, that it might not have done so, and in that case the estimate of compensation would have been limited to the time designated. But this was not done, and under this proceeding it will acquire the right of way for the

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whole period of its existence as a corporation, and cannot reduce the compensation to the owners by assuming that a time will come when the public will have an easement in the street, and that it will be entitled from thenceforward to use the street as a site for its road without compensation to the owners of the fee.

The commissioners do not give anything for the land in the street that is actually taken, and the amounts allowed for injury to the adjacent lots seems to us to be large; but the commissioners went on the ground and made the estimate from their own view and personal knowledge of the value of the adjacent property, and their opinions as to the injury that will result to the appellees from the occupation of the street by the appellant's road. No evidence was taken by either party, and there is nothing in the record upon which we are enabled to say that the damages allowed are excessive.

But we are of the opinion that the court erred in awarding the writ of *habere facias*. The agreed case provided that the appellant might proceed at once to lay down its track in the street, and in case the compensation awarded was not paid, that the appellant should be enjoined from the further use of the street until it was paid. It was competent for the parties to waive their right to dispossess the appellant, and having done so, they should be restricted to the remedy by injunction.

The order awarding *habere facias* is reversed; in all other respects, the judgment is affirmed, both on the original and cross-appeal.

Hobbs' ex'r v. Russell's ex'r.

CASE 12—EQUITY—OCTOBER 23, 1880.

Hobbs' ex'r v. Russell's ex'r.

79	61
80	112
79	61
118	211
118	214

APPEAL FROM NELSON CIRCUIT COURT.

1. An executor, or representative of a testator or intestate, cannot, when sued in his representative capacity, testify in regard to matters occurring between himself and the decedent whose representative is prosecuting the action against him.
2. That the executor was also sued in his individual capacity in the same suit does not affect the question.

MUIR & WICKLIFFE FOR APPELLANT.

1. The court erred in admitting the testimony of Samuel Russell, executor of Henry Russell, as to matters occurring between appellant's testator and himself.
2. The Civil Code, subsec. 2, sec. 606, excludes such evidence.
3. It is upon this testimony alone that the circuit court released appellee's testator from responsibility.

JOHN A. FULTON FOR APPELLEE.

1. The admissibility of the testimony of Samuel Russell, who is executor of his father, Henry Russell, should be governed by the same rules that it would have been in an issue of this kind between all the parties living before the enactment of the "Testimony Bill." Samuel Russell obtained no relief whatever by his deposition. His plea was sustained by others.
2. The contract for indulgence released appellee's testator. (1 B. Mon., 322; 7 Bush, 582; 6 *Ib.*, 20; 4 *Ib.*, 486; 2 Parsons on Contracts, 18; 4 Mon., 491; 7 Mon., 540; 5 *Ib.*, 574; 2 Bush, 181; Civil Code, sec. 606, subsec. 4, subsec. 2; 14 B. Mon., 321; 2 Met., 579; 4 J. J. M., 440; 8 Bush, 161.)

CHIEF JUSTICE PRYOR DELIVERED THE OPINION OF THE COURT.

If the defense relied on by the heirs and one of the executors of Henry Russell has been sustained by the proof, there can be no reason for disturbing the judgment, unless Samuel Russell, one of the executors, was incompetent as a witness. His testimony defeats the recovery against the heirs and executors, as the contract for indulgence is estab-

Hobbs' ex'r v. Russell's ex'r.

lished by him. This witness is not only the principal obligor in the note, but he is one of the executors of the will, and also a devisee; and while he admits the execution of the note and his individual liability, his testimony prevents any judgment against him as executor, and in this view he is testifying for himself.

The question, it seems to us, is: Can one who has no other interest than as the executor or representative of a testator or intestate testify, when sued in his representative capacity, as to matters occurring between himself and the decedent, whose representative is prosecuting the action?

In this case an executor of one testator is suing an executor of another testator, and the executor against whom the action is brought is also the principal in the note, and a devisee of the testator whom he represents. He admits his liability, but having a co-executor, the latter pleads the discharge of the testator, who was surety only in the note by reason of a contract for indulgence, and introduces the executor who was the principal in the note; and made no defense to prove the contract. Subsection 2, of section 606, Civil Code, makes him incompetent. He is testifying for himself, when, as executor, he proposes to establish his defense by his own testimony; and the fact that he has not pleaded can make no difference, as the defense by his co-executor prevents any judgment against him in his representative capacity.

The Code makes no exception as to a fiduciary against whom a recovery is sought. This witness is not only a party to the record, but is seeking to prevent a judgment against himself in a representative capacity by establishing upon his own statement a contract between himself and the decedent that must defeat the recovery. Prior to the change of the rule as to the competency of witnesses, the executor,

King, &c., v. Moody.

when sued as such, would have been incompetent as a witness to prove such an agreement, and when offered as a witness in this case should have been rejected.

Judgment reversed, and cause remanded for further proceedings. (Lampton v. Lampton, 6 Monroe.)

CASE 13—EQUITY—OCTOBER 26, 1880.

King, &c., v. Moody.

79	68
104	808

APPEAL FROM SHELBY CIRCUIT COURT.

1. A debtor, desiring to prefer his individual creditors to the exclusion of those to whom he was liable as surety merely, in order to accomplish that purpose, sold his property, and applied the proceeds to the payment of his individual debts. This, whether so intended or not, was an evasion of the act of 1856.
2. Whenever the debtor contemplates insolvency, and, with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not obtain without such act of the debtor, it comes within the act of 1856.

BULLOCK & BECKHAM FOR APPELLANT.

1. The proof shows that Bright's assets exceeded his liabilities several thousand dollars.
2. Insolvency and a design to prefer creditors must concur before the trust for the benefit of all his creditors can result from the operation of the statute. (11 Bush, 353.)
3. Bright could not know, nor could he believe, with any reasonable certainty, that he would be called on to pay the debts he owed for others as surety.

CALDWELL & HARWOOD FOR APPELLEE.

1. The statute evidently designed to secure an equal distribution of the estates of insolvent debtors, and to prevent an evasion of any of its provisions by any device whatever.
2. Since the original act of 1856, the statute has been enlarged, and now covers every conceivable device to prefer creditors. (Letcher v. Stagner, 2 Duv., 424; Wilson v. Snelling, 3 Bush, 322.)
3. The debts Bright owed as surety were as much his debts as if he were principal.

King, &c., v. Moody.

JUDGE COFER DELIVERED THE OPINION OF THE COURT.

The total amount of Bright's individual indebtedness at the time he made the payments amounted to the sum of \$8,136 20, including interest on King's debt, and \$125 to Ford. His assets amounted to about \$9,000, exclusive of the railroad stock and bonds, which had only a speculative value, and could not be relied upon for the payment of debts.

He was surety for J. M. Calloway to Guthrie for \$2,593, and for Jones & Bro. for \$600. Calloway was dead, and his estate insolvent, and Bright supposed then that it would pay from twenty-five to fifty per cent. One half the Guthrie debt is \$1,296, besides interest.

He could only count on Calloway's estate paying of that sum \$332, leaving \$964 to be paid by him as surety.

This liability then known consumes all that was left of his assets after paying his individual debts; so that, leaving out of the account his liability for Hopkins and Jones Bros., and on the \$9,000 note to the Bank of Eminence, on each of which he might reasonably have anticipated that he would be compelled to pay something, he must have known when he made the payments to the appellants that he was insolvent.

2. Mrs. Snapp was a creditor when she sued. The writing consenting to the discharge of Hopkins was signed by her before the suit was commenced, but only became effectual when signed by Miles, which was not done until after the suit was brought.

As she was a creditor when the suit was commenced, it inured to the benefit of all the creditors, and might be taken advantage of by any of them at any time before it was actually dismissed as to her. (*Sawyers v. Langford*, 5 Bush, 539.)

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3. The statute declares that every sale, mortgage, or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor, in contemplation of insolvency, and with the design to prefer one or more creditors, &c., shall operate as an assignment for the benefit of all his creditors.

It has been held that in order to bring a sale within the statute it must be made to a creditor or colluding stranger. (Temple, Barker & Co. v. Poyntz, 2 Duv., 277.)

Brentlinger, to whom Bright sold his land, was not a creditor, and if any act of Bright has operated to transfer his estate for the benefit of all his creditors, it was the payment of the money arising from the sale to his individual creditors, with the design to prefer them to the exclusion of those to whom he was liable as surety merely.

Whether the simple payment in money, when made in contemplation of insolvency and with the design to prefer the creditor so paid to the partial or total exclusion of other creditors, is within the statute, has never been decided by this court.

The act of 1856, as originally adopted, did not contain all the provisions now contained in article 2, chapter 44, General Statutes. The words, "and every judgment suffered by any defendant, or any act or device done or resorted to," are not in the original act. But they are contained in an amendment approved March 8, 1862. (Myers' Supp., 239.)

This amendment may have been suggested by the facts out of which the case of Letcher v. Stagner (2 Duv., 423) originated in the spring of 1861. There Stagner, with the design to prefer certain creditors over others who had sued him, went into court on the first day of the term and con-

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fessed judgments in favor of certain creditors whom he desired to prefer, and co-operated with them in having executions issued and placed in the sheriff's hands on the same day, thereby creating liens in advance of the time when the creditors who had sued could obtain judgments and executions. This was held to be within the statute, "because it gives a lien on the debtor's property," and thus "transfers" an interest in it as effectually as a more technical "mortgage" or "assignment" could possibly have done. It was, therefore, in essence and effect, and, consequently, in both the popular and legislative sense, "an assignment," made "in contemplation of insolvency."

Wilson v. Snelling (3 Bush, 322) was a very similar case.

These cases establish this principle, that whenever the debtor contemplates insolvency, and with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not have obtained without such co-operating act, such act is within the statute.

In this case, the debtor desiring to prefer his individual creditors to the exclusion of those to whom he was liable as surety merely, *in order to accomplish that purpose sold his property*, and applied the money arising from the sale to the payment of his individual debts. This, whether so intended or not, was an evasion of the statute, and if sanctioned, would practically defeat its operation.

Wherefore, the judgment is affirmed.

Judge PRYOR not sitting.

Helm, &c., v. The Commonwealth, &c.

CASE 14—EQUITY—OCTOBER 28, 1880.

Helm, &c., v. The Commonwealth, &c.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

1. T. A. McGill was sheriff of Breckinridge county for 1871 and 1872, with different sureties on each of his bonds. A settlement of his accounts for 1871 showed a balance due from him of \$2,407.31, which was carried over into his settlement for the levy of 1872. Between the two settlements he paid exceeding that amount to the commissioner of the county court.
2. No application of this payment having been made by the sheriff, it is presumed that he made it in discharge of the balance due from him for the year 1871, and it must be so applied.
3. It is not shown that he paid any part of the balance due for 1871 out of taxes collected for 1872, and the presumption is that he did his duty in the absence of proof to the contrary.
4. The order of the county court, that the sheriff pay over the money to the commissioner, "to be applied to the purchase of county bonds," is no appropriation of the money.
5. The orders of the county court giving the sheriff further time to pay the balance due from him was without consideration, and revocable, and therefore did not release his sureties.

WILLIAMS & BROWN FOR APPELLANTS.

1. The effect of the orders of the county court giving further time to the sheriff to pay the balance due from him to the county was to release the sureties. (*Sneed's ex'r v. White*, 3 J. J. Mar., 525; *Martin v. Taylor*, 8 Bush, 384; *Robinson v. Miller*, 2 *Ib.*, 179; *Offutt v. Glass*, 4 *Ib.*, 486; *Kenningham v. Bedford*, 1 B. Mon., 325.)
2. The order directing the commissioner to invest the money due in the purchase of county bonds, gave to the holders of these bonds an enforceable right to the money in McGill's hands. (11 B. Mon., 147.)
3. The settlement reported by the commissioner related exclusively to the taxes for 1872, and therefore the payments made should have been applied to the balance due thereon.

JOHN A. MURRAY FOR APPELLANT.

1. There is no law making it the duty of a sheriff to pay moneys in his hands, due to a county, to a receiver appointed by the county court. Miller had, as receiver, no right to demand the money from the sheriff. (*Weaver v. Bracken County Court*, MS. Opin., January, 1857; *Owens v. Ballard County Court*, 8 Bush, 611.)

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2. The effect of the orders of the county court was to say to the sheriff: "You need not exercise any diligence in collecting," and was to release the appellants.
3. The bond for 1872 does not, and cannot embrace delinquencies of a former year. (*Newman v. Metcalfe County Court*, 4 Bush, 67; 24 Wisconsin, 518; 105 Mass., 295.)

W. LINDSAY FOR APPELLANT.

1. There was no ground for the presumption that the amount paid by the sheriff, after his settlement in regard to 1871, was made up of collections for the year 1871, and not for 1872. The case of *Cummins v. Ballard County Court*, MS. Opin., is in point.
2. The sheriff proves that he kept his collections for both years together, and they went into a common fund.
3. The county court, after the appointment of Miller as receiver, actively interfered with the discharge of his duties, by frequently ordering that the sheriff be allowed further time to pay the moneys collected by him. The effect was to suspend the right of action, and to release the sureties.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

T. A. McGill was sheriff of Breckinridge county for the years 1871 and 1872, and gave bond each year for the collection of the county levy. Some of the sureties on one bond were not on the other. Settlement of his accounts for 1871 showed a balance in his hands of \$2,407.31. This balance was carried into his settlement for the levy of 1872. It appeared from that settlement that he had paid out, between the dates of the two settlements, a sum exceeding the balance found against him on the first settlement; but it did not appear out of what fund these payments had been made, nor whether the payments were intended to be on account of the balance due for 1871 or on account of the levy of 1872.

In this state of the accounts the county court appointed a commissioner to collect the balance due from McGill. The commissioner brought this suit in equity against the sureties on each bond, and on final hearing the court

adjudged that the sureties on the bond of 1872 were liable for the whole balance due from him, and rendered judgment accordingly, from which they prosecute this appeal.

No application of the payment, made after the first settlement, having been made by the sheriff or the county court, the sureties on the bond of 1872 insist that they should be applied to the liability for collections made by the sheriff for that year. In this we cannot concur. The evidence does not show from what source the money arose with which the payments in contest were made. The sheriff was charged with the entire taxes for 1871. If he had collected them at the time the settlement was made, he then had the money in his hands represented by the balance found against him; if he had not collected all the taxes of 1871 he should be presumed to have collected them afterward, before he collected the taxes of 1872, and it ought to be presumed that he made payments on account of the balance of the fund of 1871. It was his duty to so keep his accounts as to show out of what fund he made payments. This, he says, he did not do, but he does not prove that he paid any part of the balance for 1871 out of the taxes of 1872, and we ought to presume he did his duty, and paid it out of the taxes of 1871.

But, if no such presumption arises, the law must make the application of payments not applied by the parties nor either of them.

In a very similar case (*U. S. v. Kirkpatrick*, 9 Wheaton, 737), Mr. Justice Story said in cases where there are long running accounts, and debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of

time. (*Hammers v. Rochester*, 2 J. J. Mar., 144.) This court said, discussing this subject, that the order of time in which debts become due is a circumstance which should not be without its influence. (See also 5 Bush, 185.)

If injustice results to the appellants from the application of this rule, it is not on account of any fault of the county court. The balance due for 1871 is shown on the settlement of January, 1872, and whatever confusion and uncertainty exists, results wholly from the failure of their principal to indicate, when he made payments, to what liability they should be applied.

It appears that after the settlement of his accounts for 1872 was made, he was ordered by the county court to pay over the balance in his hands to a commissioner appointed for the purpose of receiving it, "to be applied to the payment of county bonds."

It is contended that this order was an appropriation of the money, and that thereafter it belonged to the holders of county bonds, and should have been sued for by them.

We do not think so. The order directs it to be paid to the commissioner, and he is directed to pay it to the holders of county bonds.

This gave the holders of bonds no right to sue the sheriff, and was not intended to do more than to indicate the use to which the money would be applied when collected; and the subsequent action of the sheriff and the county court shows that the order was so understood.

The court made orders from time to time giving the sheriff further time to pay, which amounted, in the aggregate, to several months. This the sureties rely upon as releasing them, the indulgence having been granted without their knowledge or consent. Their argument is, in sub-

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stance, that the orders giving further time for payment suspended the county's right of action, and consequently deprived them of the right to pay the amount for which they were liable, and to proceed against their principal to compel him to reimburse them, or to proceed against him for indemnity.

If the orders had that effect, then they are clearly right. But did they have that effect? There was no consideration for the indulgence, and the orders granting it might have been set aside at any time, or might have been disregarded and suit ordered at any moment; and as the court might have disregarded them, the sureties had the same right. It is true the commissioner had no right to sue during the time covered by the orders without express directions to do so. But this was not because the right of action was suspended, but because the commissioner, being the officer of the court, was bound to obey its orders.

The law made it necessary, before suit could be brought, that a commissioner should be appointed to collect the money, and that when brought, the suit should be in his name.

The principle involved is the same as if a private person should assign a note for collection, and afterward enter into an agreement not to sue or allow suit to be brought until after the lapse of a specified time. In such a case it would not be contended that the surety was released if the agreement to forbear to sue was made without consideration. He would have a right at any moment to revoke the order given to the assignee not to sue, and to disregard the agreement with the debtor, and cause suit to be brought. In a word, such an agreement would be the ordinary case of an agreement without consideration to indulge the principal,

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which no one pretends would discharge a surety. That the county court can only speak by its records does not alter the case. Its acts in respect to a debt due to the county are merely ministerial, and when it makes an agreement, a consideration is just as essential as between private persons, and we perceive no more reason for presuming a consideration in such a case than in any other.

Nor are we able to perceive that the order giving further time to pay without interest was an actual injury to the sureties. The argument is, that by making that order, the court encouraged the sheriff to withhold payment by relieving him from the payment of interest, if he should do so. This may possibly be true, but the mere possibility or even probability of injury from that cause is too intangible to be made the basis of judicial action.

A careful examination of the record, and consideration of the argument of counsel, has failed to convince us that there is any error in the record, and the judgment must be affirmed.

CASE 15—EQUITY—OCTOBER 28, 1880.

Johnson v. Utlej.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. Sec. 4, art. 2, chap. 60, title "Interest and Usury," was repealed by the act of March 2, 1878. It was in the nature of a penalty.
2. After the repeal of this section the obligee might recover legal interest upon his demand, although the obligation contained usury.

JNO. L. SCOTT FOR APPELLANT.

1. There can be no forfeiture in this case, for, although the obligation is for ten per centum interest, and is usurious, inasmuch as the 4th section of the usury law was repealed by the act of March, 1878, appellant is entitled to recover his debt, with eight per cent. interest.

Commissioners Sinking Fund v. Green and Barren River Navigation Co.

IRA JULIAN FOR APPELLEE.

1. The amendment to the usury law, approved March 2, 1878, did not change or alter the General Statutes nor repeal section 4, which provides for a forfeiture of all interest if usury be contained in the obligation.
2. It is obvious that the notes sued on (bearing ten per cent.) come within the provisions of section 4, because eight per cent. was the legal rate of interest when the notes were executed.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The forfeiture by the party loaning at a greater rate of interest than that provided by the General Statutes and the subsequent amendments was in the nature of a penalty, and when the section authorizing the forfeiture was repealed by the act of March 2, 1878, there was nothing to prevent the obligee from recovering his debt with legal interest.

The legal rate of interest by the act of March 2, 1878, is 6 per cent., and the appellant was entitled to recover his debt with that rate of interest. For this reason alone the judgment is reversed, and cause remanded, with directions to enter judgment accordingly.

CASE 16—EQUITY—OCTOBER 29, 1880.

Commissioners of the Sinking Fund v. Green and Barren River Navigation Co.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. The state has the same power to improve its navigable streams as to improve her highways, and when it is necessary to develop the resources of the commonwealth and to facilitate commerce, contracts may be made with individuals or corporations, and, as a consideration for such improvements, the tolls arising from the use of the rivers may be transferred by the state.
2. An exclusive privilege to navigate any stream in the state cannot be granted, but it is competent for the state to authorize the corporation improving it, under a contract with the state, to charge tolls

79	73
88	10
79	73
97	610

 Commissioners Sinking Fund v. Green and Barren River Navigation Co.

prescribed by the general assembly, reserving the right to all citizens to navigate the stream upon the payment of tolls.

3. The act of 9th March, 1868, entitled "An act to incorporate the Green and Barren River Navigation Company," approved March 9, 1868, coupled with the execution of the bond mentioned therein by the appellees, constituted a valid and subsisting contract between the state and the appellees.
4. The act of the general assembly, entitled "An act to repeal in part an act, entitled 'An act to incorporate the Green and Barren River Navigation Company,'" approved April 5, 1880, is unconstitutional and void.
5. The contract between the state and appellees is not the subject of repeal by the general assembly.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLANTS.

1. The eminent domain of the state consists of property and rights held for the people. The former she may part with, the latter she cannot. Vested rights have reasonable limits and restrictions, and must have some regard for the general welfare and public policy.
2. Appellee is a public corporation, invested with public and police powers, and therefore the act transferring to it the franchises mentioned therein is the subject of repeal. (Cooley on Const. Lim., 523; *Ib.*, 525, 537; *Transylvania University v. City of Lexington*, 3 B. Mon., 27; *Griffin v. Kentucky Ins. Co.*, 3 Bush, 594.)

JNO. & J. W. RODMAN FOR APPELLEE.

1. The general assembly had the constitutional power to pass the act of March 9, 1868. (12 Conn. Rep., 16; 18 *Ib.*, 501; 14 Howard, 474; 2 Peters U. S., 250; *Melnor v. R. R. Co. Dist. New Jersey*, Am. Law Reg., 1857; *McReynolds v. Smallhouse*, 8 Bush, 447.)
2. The act of March 9, 1868, creates a contract between the state and appellees, under which rights have vested that cannot be destroyed. (*Fletcher v. Peck*, 6 Cranch, 87, 156; *Dartmouth College v. Woodward*, 4 Wheat., 641; 9 Cranch, 52; 8 Wheat., 1; 2 Haywood's N. C. Rep., 310; 2 McChord, 354; *Keith v. Hamilton*, 5 Bush, 458; *Walker v. Gregory*, 2 Met., 598; 8 Bush, 447; *Baldwin v. Commissioners Sinking Fund*, 11 Bush.)
3. Appellees are a private corporation. (Potter on Corporations, 26; Angell & Ames on Corporations, sec. 31.)
4. Appellees could have no counter-claim against appellants. (*Commonwealth v. Todd*, 9 Bush, 708.)

W. LINDSAY FOR APPELLEE.

1. This court, in *McReynolds v. Smallhouse* (8 Bush, 447), decided that the legislature could constitutionally part with the possession and control of Green and Barren rivers; and in the *Kentucky River*

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Navigation Co. v. The Commonwealth (12 Bush, 8), it is held that a line of navigation, similar in every respect to that on Green and Barren rivers, is the legitimate subject of lease. In a case between the same parties (13 Bush), the validity of the lease was conceded by both sides.

2. A public corporation is a part of the government, created for the purpose of aiding and sustaining the laws indispensable to government. This is a mere private corporation. (Murphy v. Louisville, 9 Bush, 196; Louisville v. The Commonwealth, 1 Duv., 297; 4 Wheat, 629.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The Green and Barren River Navigation Company was incorporated by an act of the legislature passed on the 9th of March, 1868; and by an express provision of its charter leased from the state for the period of thirty years the Green and Barren river line of navigation, and by the second and third sections of the act there was transferred to the company all the rights, franchises, &c., pertaining to this line of navigation, and the possession delivered in consideration that the company would maintain and keep the line in repair, and permit all boats, crafts, and other vessels to navigate the two rivers according to certain specified rates prescribed as tolls, which shall inure to the company. A bond in the penal sum of five hundred thousand dollars was executed by the company with surety, and approved by the Governor, for the performance of the duties and obligations imposed under the contract between it and the state. The state had constructed locks and dams on Green river, necessitating a large expenditure of money, and in the preamble to the act incorporating the present appellee (the Green and Barren River Navigation Company) recited the fact "that the line of navigation had always been a charge upon the State, and was then largely in debt and without prospect of any better condition; and as it was of importance to the country to keep the working line in order, and to avoid"

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expense to the state, the same is leased and conveyed to this incorporated company," &c.

The appellee took possession of the improvements on these rivers under the lease from the state, and continued in the undisturbed enjoyment of the franchise until the 5th of April, 1880, when the legislature of the state passed an act, entitled "An act to repeal in part an act, entitled 'An act to incorporate the Green and Barren River Navigation Company,'" &c. The first section of this repealing act is to amend so much of the original act of incorporation, passed on the 9th of March, 1868, "as leased and conveyed to the appellee and its successors the Green and Barren river line of navigation, and their tributaries, together with the grounds, houses, water-works, water-power, &c.; and so much of said act as gave to the company the tolls and revenues arising or to arise from said line of navigation." The Commissioners of the Sinking Fund were authorized to take possession of the same by the first of January, 1880, or as soon thereafter as practicable, by agents appointed for that purpose. The company, on a demand made by the Sinking Fund Commissioners of the possession, refusing to deliver it, the present action was instituted to recover the property. The company answered, setting forth the lease of the 9th of March, 1868, the use and possession of the franchise and property from that time until the institution of the action, a period of near twelve years; that it had performed all the conditions of its covenant to the state, and faithfully discharged all the duties and requirements of its act of incorporation, and has permitted all boats, vessels, &c., to navigate the rivers, at all times, upon the terms prescribed by the charter and lease made by the state; that they had expended large sums of money, and were ready, willing, and

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then performing their part of the contract, and denied the power of the legislature to annul at its pleasure the agreement between it and the state. A demurrer was filed to the answer, and overruled, and the Commonwealth electing to stand by the demurrer, has brought the case to this court. The appellee maintains that the repealing act of the 8th of April, 1880, is unconstitutional, and this is the sole question in the case.

That both of the rivers, Green and Barren, are navigable streams, and were used by the public for all the purposes of trade and navigation at the time the contract was entered into between the state and the appellee, and that the state had expended large sums of money in constructing the locks and dams on Green river, so as to extend the line of navigation, are facts conceded by the parties, and the rights and powers of the state government over the two navigable streams must determine the propriety of the judgment below.

It is insisted by the attorney for the state that a navigable stream is that character of public property in which every citizen has a private interest or right of property of which he cannot be deprived by any legislative action. The right of the state to make the improvements so as to increase the trade and commerce on these streams, and develop the resources of that part of the state is not questioned, with the additional right to regulate and prescribe the rate of toll the citizen must pay in navigating either river; but, at the same time, it is urged that this right to improve the rivers, or the right to keep the improvements in repair after they are made, when granted to others, is such a disposition of the private rights of the citizen in this public property as is inhibited by the constitution.

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It may be conceded that the legislature has no more right to exclude the citizen from the use of these great natural highways than to deny him the right to travel on any of the ordinary highways of the State, as no such power has, we think, been attempted to be exercised in the case being considered. The state, in making the improvements, had expended large sums of money, and finding it necessary to make annual appropriations for keeping the improvements in repair, thought it best for the interests of the state to lease this line of navigation to the appellee, in consideration that it would make the expenditures for repairs, reserving the right of all persons to navigate these rivers upon the payment of certain tolls at the time regulated and fixed by the legislature. Tolls were being collected by the state when this lease was made, and why the representatives of the people, who are presumed to look to the interests of their constituency and that of the state, could not rid the state of the burden by permitting others to assume it, we cannot well see. Justice Cooley says that the "general right to control and regulate the public use of navigable rivers is unquestionably in the state;" and it does not follow because the right to navigate our public rivers is common to all, that the manner of its use cannot be controlled and regulated by the state government. The state has the same power to improve its navigable streams that it has any of its highways; and when it becomes necessary to extend the line of navigation for the purpose of developing the resources of the state, or to facilitate trade and commerce, the state may contract with individuals or corporations for the construction of such improvements, and as a consideration therefor, transfer to them the tolls arising from its navigation. It is not pretended by any pleading in this cause

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that an exclusive privilege has been granted the appellee to navigate the two rivers; for if such was the case, it might then fall within the constitutional inhibition; but, on the contrary, the state has prescribed the rate of toll as a part consideration for the undertaking, and reserved to its citizens the right to navigate both rivers upon the payment of tolls.

These streams constitute a part of the territory of the state, and while it is conceded the state may turnpike its highways, or authorize others to do so, and collect tolls from the citizen, it is urged that it has no power to place its rivers under the control of others in consideration of improvements made, although the public interest, of which the legislature must be the judge, demands it.

The eminent domain pertaining to every sovereignty is not surrendered by this legislative action. When the public necessity demands that a right of way should be established, and the owner refuses to surrender the use, upon being compensated in damages, his private rights must yield to the necessities of the public, while this right of eminent domain, when applied, says Justice Cooley, to navigation in seas, lakes, public rivers, &c., is complete without any such action on the part of the state, and to that extent differs from the common highway established over the land of the owner with or without his consent.

When the property of the citizen is taken in the exercise of this sovereign power, the legislature may confer on a corporation the right to charge tolls in consideration of its being placed in a condition for public use; but when the state is already in possession of its navigable waters, and no condemnation is requisite or compensation required, it is attempted to be maintained that no such power can be exercised, and our navigable rivers are to remain unimproved,

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or the improvements already made permitted to decay for the reason that the State is unwilling to burden the citizen with taxation for that purpose, and is denied the power to permit the improvement to be made by others, for no other reason than that the law of nature has already appropriated them to public use.

The fallacy of this reasoning, if followed, would prevent the state from placing a dam in the river that might tend to prevent its free use by the citizen who was unable to pay the toll. The question involved in this case was, in effect, decided by this court in the case of *McReynolds v. Smallhouse*, reported in 8th Bush, in which the appellant, who refused to pay toll when navigating these rivers, insisted that the contract between the state and the present appellee was in violation of both the state and federal constitutions. It was held in that case that the act was constitutional, the only difference in the two cases being that the Commonwealth is now the party appellant, and is endeavoring to sustain the legislative repeal of so much of appellee's charter as evidences the existence of the lease, for the want of power in the legislature to make it.

In the two cases of the Kentucky River Navigation Company against the Commonwealth, reported in 12th and 13th Bush, where the state had leased the Kentucky river to a company for a period of forty years, the Commissioners of the Sinking Fund sought to cancel the lease upon the ground of a failure on the part of the company to comply with its contract, by reason of its insolvency and for other causes. On the final hearing, the lease was canceled, and the possession of the river, locks, dams, &c., restored to the state. The constitutional question, it is true, was not raised in either case; but the court, as well as the counsel repre-

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senting the state, evidently regarded such an exercise of legislative power as authorized by the constitution; otherwise the question would at least have been considered.

The act of incorporation in the present case, embodying the terms of the contract, was granted in consideration that the company would keep the line of navigation in repair for twenty years, and to secure its performance a bond, with surety in the penalty of five hundred thousand dollars, was executed to and accepted by the State. It entered upon the improvements, and, so far as this record shows, has complied with every stipulation required to be performed on its part, and without any other reason than the alleged power of the legislature to disregard such contracts at its will and pleasure, the company is called on to surrender its control over these improvements and the benefits resulting from the lease, without any compensation whatever. The repeal of this part of the company's charter cannot be held to have divested it of any of its rights, or impair the validity of the contract under which these rights are asserted.

The right of the state to resume the control of these improvements, when public necessity demands it, on the payment of a just compensation to the appellee, is unquestioned; in other words, the right of the state to take private property, or rights in property, acquired under a legislative enactment of whatever kind for public use, upon compensation being made, cannot be doubted, nor can one legislature bind a succeeding one, by contract or otherwise, so as to prevent the exercise of this sovereign power. In this position we concur with counsel, but cannot assent to a doctrine that will allow the state to alter or abolish such contracts whenever, in the opinion of the legislature,

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the necessities of the public or the interests of the State require it.

The argument of counsel would have much weight if, by the terms of the contract, the right to navigate these rivers belonged exclusively to the appellee; but the mere incidental advantages this company may have over others, in running its boats free of toll, is not such an exclusive privilege as creates a monopoly or violates any provision of the constitution. It pays a fair equivalent for this privilege in the expenditures for repairs, to which others navigating these streams with their boats cannot be subjected. Case after case might be cited to show that such grants are not liable to any constitutional objection—some of the cases going so far as to determine that the state might not only obstruct, but close up such streams, when not restricted by the federal constitution. (*Raily v. Railroad Company*, 4 Harrington; *Neage v. Moon*, 14th Howard.) While this court is not disposed to concede the power to such an unlimited extent, the right of the legislature to give to the appellee such control over this line of navigation as it claims under its charter, cannot be successfully questioned; and, in our opinion, both the state and federal constitutions present insuperable barriers to the recovery in this case.

The appellee is strictly a private corporation, vested with other rights and privileges, by reason of its charter, and the only duty it owes to the state or the public is a faithful performance of the contract between it and the state. There is no question before us as to the character and extent of the control the state may have over the appellee or its navigable waters so long as this contract remains in force, nor is there any breach of the obligation assigned or claimed to exist as against the company, and none could

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have been assigned under the repealing act being considered. The only question is: Had the legislature the power to annul the contract? We think not, and must adjudge that the act of the 8th of April, 1880, is unconstitutional and void. The charter of the appellee has not been repealed, but only so much of it as relates to the lease; and if there had been a repeal of the charter by reason of the statute of 1856, the provision of the first section of that act, "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested," would secure to the appellee its right under the lease. The right of the appellee to the tolls and benefits of this line of navigation originated from the contract made with the state, and any legislation impairing its obligations, without the consent of the appellee, is a violation of the constitution.

Judgment affirmed. (Kellogg v. Union Company, 12 Conn. ; Thames Bank v. Lovell, 18 Conn.)

Judge HINES not sitting.

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CASE 17—EQUITY—SEPTEMBER 18, 1880.

Robinson v. Duvall.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. When, subsequent to the death of one of several beneficiaries of a life policy, the policy is renewed, it is in a modified sense a new contract, which inures to the benefit of the surviving beneficiaries, and, so long as any of the beneficiaries are living, the insured has no interest in the policy, and cannot make an assignment thereof.
2. A policy made payable to the wife and children of the insured, "or their representatives," is held to be for the benefit of the only child of the last survivor of the children of the insured, the wife and

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other children having died without issue; and a niece of the insured, to whom he assigned the policy after the death of his wife and children, has no right to any part of its proceeds.

ELLIOTT & ATCHISON FOR APPELLANT.

LANE & HARRISON FOR APPELLEE.

No briefs on file.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

April 1, 1872, B. F. Crowfoot insured his life in the Connecticut Mutual Life Insurance Company for the sum of \$5,000, payable to his wife and children, or their representatives. At the date of the policy the insured had three children, all minors and unmarried.

In a few days thereafter his wife died. He continued to pay the annual premiums as they fell due, until April 7, 1878, when he died, having survived all his children, two of whom died in infancy and unmarried, and one, having married, left an only child, the appellee, W. I. Duvall, and her husband surviving her.

Before his death, and after the death of *all his* children, the insured assigned and delivered the policy to his niece, the appellant, Hattie E. Robinson, intending it as a gift to her.

The executor of the insured, the guardian of the infant grandson, W. I. Duvall, and Hattie E. Robinson, all claiming the proceeds of the policy, the insurance company brought its petition of interpleader, and paid the money into court, and the court having adjudged it to W. I. Duvall, Robinson alone has appealed.

Her counsel argues, in effect, that upon the delivery of the policy, Mrs. Crowfoot and the three children of the insured became invested, each with a one fourth interest in it; and that upon the death of Mrs. Crowfoot her interest passed to her husband under the statute of distributions;

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and that at the death of the unmarried daughters their interests passed to their father in the same way; and at the death of Mrs. Duvall, during the life of her father, her interest lapsed as if it had been a legacy; and in this way insured became the owner of the entire policy, and could invest the appellant with a good title.

A life policy, as between the assured and the insurer, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general rules which govern in the interpretation of other contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, should be regarded in the light of a testamentary provision rather than of a contract.

The object of all interpretation of acts or words is to arrive at the intentions of the person whose acts or words are to be interpreted, and the nature of the transaction and the relation of the parties are frequently important, and sometimes controlling factors in the problem.

In taking the policy the insured was not providing for himself, but for his wife and children after his death; and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should pass to himself, and at his death to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family—wife and children alike—to suppose that his intention was, that in case one or more should die before himself, without leaving children,

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the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death, and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived; and this evident intention ought not to be defeated unless there are insurmountable legal obstacles in the way of effectuating it.

So far as any interest the wife of the insured had in the policy is concerned, the rights of the parties are regulated by statute in harmony with the view just expressed.

“A policy of insurance on the life of any person, expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors.” (*Section 30, act 12th March, 1870; 1 Acts '71.*)

When Mrs. Crowfoot died her interest in the policy insured, under this statute, to the benefit of her children.

When one of the children subsequently died, without living issue, and the policy was again renewed by the payment of the annual premium, there was in a modified sense a new contract (*Thompson v. Cundiff, 11 Bush, 573*), which inured to the benefit of the children then living, there being no issue of those who were dead; so that, at the death of Mrs. Duvall, the last survivor of the children of the insured, she was the sole beneficiary.

Section 32 of the statute, *supra*, provides, that “when a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of

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a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same."

At the time the policy was last renewed before her death, Mrs. Duvall was the only surviving child of the insured, and as she was the only living person answering the description of beneficiaries, as contained in the policy, and as the other beneficiaries had died without issue, it is to be taken to have been renewed for her sole benefit. When it was last renewed she was dead, and there was no person living answering the description except her surviving child, who, in our opinion, is her representative within the meaning of that word as used in the policy.

In *Insurance Company v. Palmer* (42 Conn., 60) the policy was payable to the wife if she survived her husband; if not, to their children. The husband survived the wife, and one of the children died during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled, if he had survived the insured.

This is a much stronger case for the issue of the deceased child than that.

There the policy, in the contingency that had happened, was payable to the children; here it is payable to the children or "their representatives." This expression shows that the possibility of the death of some or all of the children during the life of the insured was not overlooked, and that such an event was intended to be provided for. And when we consider the nature and design of life insurance, and the relation of the parties, we think the policy should be construed as if it were payable to such of the children as should survive the insured, and the surviving issue of such

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as might die during his life. We are, therefore, of the opinion that the insured had no interest in the policy, and that the assignment made by him to the appellant gave her no right to any part of its proceeds, and the judgment is affirmed.

CASE 18—EQUITY—OCTOBER 30, 1880.

Collins v. Collins.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

1. The remedy is included in the obligation of contracts.
2. The remedy cannot be so altered as to materially impair the obligation. If the impairment be material, it is forbidden by the constitution.
3. The laws in force when the contract is made form a part of it.
4. The act providing "for the redemption of real estate sold under an order or judgment of a court," approved April 9, 1878, has no application to the demand of appellee, inasmuch as the obligation was executed, and appellee's cause of action accrued several years prior to the passage of the act.

CHENAULT & BENNETT FOR APPELLANT.

1. The act of April 9, 1878, providing "for the redemption of real estate sold under an order or judgment of a court," does not impair the obligation of the contract sued upon. The remedy is altered, but not so as to affect the contract. The case of *Edwards v. Kersey* (96 U. S., 595) is not analogous.

C. F. & A. R. BURNHAM FOR APPELLEE.

1. In altering the remedy, and the requirement of sale existing at the date of the institution of this suit and before, the obligation is affected to the injury of appellee.
2. The act in question cannot constitutionally operate upon this case, because it was passed after appellee's cause of action had accrued, and had been asserted by suit. (Constitution U. S., art. 1, sec. 10; 1 Howard, 311; Bullitt's Code, secs. 439, 441, 744, 699; 8 Wheat., 75; 3 Howard U. S., 707; 96 U. S., 595; 12 Wheat., 318; January v. January, 7 Mon., 544; Blair v. Williams, 4 Litt., 39; Lapeley v. Brashear, *Ib.*, 47.)

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JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for \$200 and costs against appellant, on which an execution was issued and returned "no property found," in the year 1871.

He then instituted his action on said judgment and return for the purpose of subjecting to the satisfaction of the judgment an undivided life interest of appellant in a tract of land devised to him.

At the January term, 1878, a judgment of sale was rendered, and it was made in pursuance of the judgment, without appraisement or provision for redemption within twelve months by the appellant or his creditors, in the event the land should fail to bring two thirds of its appraised value, as provided by an act of the legislature "for the redemption of real estate sold under an order or judgment of a court," approved April 9th, 1878.

The appellant appeared for the first time, and excepted to the master commissioner's report of sale, on the ground that the land had not been sold as required by the law named above.

His exceptions were overruled, and the report confirmed. The only question, therefore, presented by this record is, whether the act applies to debts created before its passage, or does it fall within the inhibition of the clause of the tenth section of article one of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts."

"The obligation of a contract is that which obliges a person to perform his contract, or to repair the injury done by a failure to perform it." (Blair v. Williams, 4 Litt., 36.)

The obligation embraces the remedy, which includes all the legal means allowed by law at the creation of the con-

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tract to enforce its performance or redress the injury resulting from its non-performance.

The remedy has been said to be the breath of the vital existence of the obligation. Without the remedy, the legal obligation is not enforceable. So that "want of right and want of remedy are the same thing" in effect, the non-existence of either being equally fatal to the claims of a party in a court of justice.

The efficacy of the law lies in the remedial part of it, which is the very essence "of the protection of the laws," guaranteed by the constitution, whose framers were so jealous of the rights of persons under contracts that they declared the prohibition against violating their obligation in universal and rigorous terms, in order, it must be concluded, to allow no evasion of their purpose which was to give to contracts their full force, and to parties their exact and complete rights under them as and when they should be made. The language of the constitution certainly means that no state shall pass any law impairing *to any extent* the obligation of contracts. And whatever is embraced by the obligations is protected from injury or diminution. As the remedy is truly the life-continuing force of the obligation it must remain, without deduction from it, in full vigor as it stood when the contract was made. It is insisted that the law in question is but a reasonable regulation of the remedy, and that it is, therefore, valid as to pre-existing contracts.

In the case of *Green v. Biddle*, 8 Wheaton, 1, involving the constitutional validity of the occupying claimant's law of Kentucky, the Supreme Court said, as to this view of the question: "It is no answer that the acts of Kentucky now in question are regulations of the *remedy*, and not of the

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right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

There is a vast difference between taking away or dispensing with a part of the remedy, and regulating when or how it may be employed. If the remedy is preserved as it existed at the time the contract was made, legislative requirements, when reasonable, fixing a time for invoking its enforcement, or designating the forms by which it may be enforced, are not in conflict with the constitutional provision before named. But the legislature cannot do these things in such manner as to operate as a destruction or decrease of the value of the remedy; nor can it thereby dispense with any part of its force.

The ability to comply with the obligation to perform, or render redress for not performing, the contract, cannot be lessened, weakened, impaired, or taken away by the legislature by the force of a law purporting to regulate the remedy. (Blair v. Williams, Lapsley v. Brashears, 4 Littell, 651; Planters' Bank v. Sharp et al., 6 How., 301; Bronson v. Kinzie, 1 How., 311.)

The state has the right to alter the remedy, subject to the limitation that the alteration does not impair the obligation of contracts.

There is no qualification annexed to this limitation upon the power of the legislature, and neither policy nor humanity is a safe guide in construing a constitutional provision which is without ambiguity. It seems to us there is no degree in the language of the constitution quoted, and none should be interpolated by construction; but the

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encroachment, to be invalid, must be material. (6th Otto, 601, *Edwards v. Kersey*.)

In this respect the obligation is not to be impaired at all. The current of authority establishes, without serious conflict, as we conceive—

1. That the remedy is included in the obligation of contracts. (*Blair v. Williams*, 4 Littel.)

2. That the remedy cannot be so altered as to materially impair the obligation of contracts. (*Green v. Biddle*, 8 Wheaton.)

3. That if the impairment be material to any extent, it is forbidden. (*Edwards v. Kersey*, 6 Otto.)

4. That the laws in force, when and where the contract may be made, form a part of it. (*Von Hoffman v. City of Quincy*, 4 Wall., 535.)

The only remaining question for us to decide is, whether the act before us materially impairs the obligation of the contract between these parties by altering the remedy existing when it was made.

The law, before the passage of this act, authorized all sales of land in pursuance of the authority of the chancellor, to be made absolutely without valuation or appraisement; and where there was no irregularity it was his duty to confirm the sale.

No right of redemption on account of mere inadequacy of price existed; and on payment of the purchase-money the purchaser was entitled to the conveyance and possession; and, in fact, possession might have been ordered upon confirmation of the sale, while this was not usual in practice.

This act introduces material alterations in the law as it stood before its passage.

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Two thirds of the appraised value must be realized by the sale before it shall be absolute. The debtor or his creditor can comply with the terms, which converts what was formerly an absolute into a conditional sale, and defeat it altogether. This is done by paying the purchase-money and ten per cent. interest within twelve months; and during this period the debtor is entitled to the possession and profits of the land.

By this act an equitable right is invested in the pre-existing debtor, which he did not have when he made the contract. It is clear that the creditor, when he made the contract, was entitled to have a sale absolutely of the debtor's title, and a transfer of the possession of the land to the purchaser, unincumbered with the right of redemption. These constituted valuable rights and interests in the land sold under the judgment sought to be reversed herein.

Only the life estate of the debtor could be sold, and the extension of possession for one year, because the land should fail to bring two thirds its value beyond the time the debtor was entitled when he made his contract, took away from the debtor a part of the estate, itself bound for his debt. One year, or any part of the time of a life estate, which consists in the use, is as much a valuable and material part of it, as one acre is a valuable part of one hundred acres of land.

It will not be seriously contended that the equitable rights under this act are not valuable to the debtor, and a corresponding deduction from the rights of the creditor.

In speaking of a similar act of the legislature of Illinois, the Supreme Court of the United States, in *Bronson v. Kenzie et al.*, 1st Howard, 319, say that "it appears to the court not to act merely on the remedy, but directly upon

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the contract itself, and engrafts upon it new conditions injurious and unjust to the mortgagee.

It declares; that although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop."

The Illinois act applied to a mortgage as well as sales under execution; and it is held in the case *supra* that any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations and is prohibited by the constitution. So far as the injury to the creditor's property right under this mortgage in Illinois is concerned, it is precisely to the same extent as inflicted by the act of our legislature under consideration upon the rights of pre-existing creditors, whose debts may not be secured by mortgage.

The cases of *Edwards v. Kerzie*, 6 Otto; *Bronson v. McKenzie*, 1st Howard, together with reason and principle, sustain the views we have herein announced.

We are, therefore, of opinion that the act under consideration, so far as applicable to pre-existing debts, is unconstitutional.

The judgment is affirmed.

Dobyns v. Dobyns' assignee.

CASE 19—ORDINARY—NOVEMBER 9, 1880.

Dobyns v. Dobyns' assignee.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. Sec. 8, art. 2, chap. 44, Gen. Stat., does not apply to assignments made by a debtor for the payment of his debts generally.
2. An action at law against an assignee to whom property has been conveyed for the payment of debts, to enforce the creditor's claim, upon purely legal grounds, based alone upon the assignment and acceptance of the trust, cannot be maintained.
3. There is no consideration for such an action.

REID & STONE FOR APPELLANT.

The statutory requisition for an affidavit and demand is not necessary.
(Gen. Stat., 993; Bullitt's Code, sec. 438; Fox v. Apperson, 6 Bush, 665.)

C. BROCK FOR APPELLEE.

1. An affidavit and demand was necessary. (Stanton's Rev. Stat., 509; *Ib.*, 331; Myers' Code, sec. 521; Civil Code, secs. 471, 472.)
2. The action at law cannot be sustained.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT

Samuel T. Dobyns executed a deed of assignment for the benefit of all his creditors to the appellee.

Before doing so, he executed a note to the appellant, Sarah F. Dobyns, for the sum of one hundred and fifty dollars, upon which she instituted an ordinary action against appellee, after he had accepted the trust created by the deed, without making demand of him for payment of her claim.

She filed with the petition an affidavit of the assignor made in the usual form required in proof of claims against decedents' estates.

The appellee appeared, and upon his motion the action was dismissed, upon the ground that she had made no demand of him before its institution, and the law contained

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in section 8, article 2, chapter 44, General Statutes, which reads as follows, to-wit: "The claims of creditors are required to be verified in the mode required by law in respect of claims against the estate of deceased persons before any portion of the assets shall be received thereon," is relied on to sustain the judgment of dismissal.

Neither the section nor chapter cited applies to an assignment by a debtor for the payment of debts generally, but to trusts created by virtue of the statute against fraudulent conveyances.

These two classes of trusts are distinct, and flow from totally different causes.

In the administration of such trusts the object of the laws governing them is to produce an equal and equitable distribution of the assets, and in this respect only they are similar.

Chapter 3, title 10, Civil Code, provides for the settlement of trust estates and estates of deceased persons, and section 438, which is included in and closes that chapter, provides that "the foregoing provisions of this chapter shall, so far as applicable, regulate proceedings for the sale of property held in trust (by assignment) by a debtor for the payment of debts generally;" but subsection 2 of section 428 shall "not be so construed as to require all creditors holding liens upon the property . . . under the deed of assignment to be made parties."

Subsection 2 of section 428, last referred to, directs that—

"The representatives of the decedent, and all persons having a lien upon or an interest in the property left by the decedent, or any part thereof, and the creditors of the decedents, so far as known to the plaintiff, must be parties to the action as plaintiffs or defendants."

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It will be seen, by comparison of the parts of sections 438 and 428, quoted above, that the party instituting proceedings for the sale of property held in trust under a deed of assignment is required to make all persons specified in subsection 2, section 428, parties to the action, except it is not necessary to make all creditors *holding liens* upon the property under the deed of assignment parties.

The creditor must, therefore, make all persons having an interest in the property, or any part thereof conveyed by the deed, and the creditors of the assignor, so far as known, parties to the action, either as plaintiffs or defendants, with the exception noted.

The term proceeding, as used in section 438, means action in the same sense in which it is used in sections 428 and 429. By the last named section, in such an action as mentioned in 428, the petition must state the amount of the debts, and the nature and value of the property, real and personal, . . . so far as known to the plaintiff; and if it shall appear that the personal estate is insufficient for the payment of all debts, the court may order the real property, . . . or so much thereof as shall be necessary, to be sold for the payment of the residue of such debts." It is made the duty of the court, by the next section, to refer the cause to a commissioner to take proof of claims. These provisions seem to us to point out a just mode of settling trusts under deeds of assignment, and are peculiarly applicable in regulating proceedings for the sale of property held under such trust. Section 438 cannot, by any reasonable construction, be confined, in adopting the provisions of chapter 3, *supra*, so far as applicable, to a mere naked sale of property held in trust. It contemplates, in regulating such sales, the pur-

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pose of the law in requiring an equal and equitable distribution of the debtor's property in execution of the trust created by the deed of assignment. And sections 429 and 430 contain provisions applicable to proceedings for such sale, and appropriate to effect the object of such trusts in ascertaining for whom and how much it shall be made.

We do not decide that a creditor, failing to present his claim, will be barred of any remedy thereon, unless he should be a party to the proceeding. The demand contemplated by section 437 is not applicable to the sale and distribution of a debtor's property in pursuance of a deed of assignment for the payment of his creditors.

It was the duty of the assignor, before making the deed, to pay his debts as they matured, without demand, and the same duty devolves upon the assignee who, in that regard, stands in his place; but if the assignee should not be assigned enough property to pay the debts in full, then it becomes his duty to ascertain in person, or by authority of the court, the extent to which the assets will discharge the debts, and pay the creditors pro rata according to their rights of equality and priority. But he is entitled to a reasonable time to execute the trust, subject to the circumstances connected with it and the estate.

If he fails or refuses to do so he may be proceeded against by any person having a legal or equitable right against the assignor or assignee relative to the performance of his trust.

We are of the opinion that an ordinary action against the assignee to recover a judgment for a debt of the assignor cannot be maintained. To adjudge such an action maintainable would subject the assignee to a multiplicity of actions, and the estate to unnecessary cost, without having the creditors, who are the parties most interested, before the

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court, in defeating an excessive or false claim, when a simple remedy, just to all parties interested, is provided by the cited provisions of the Civil Code.

It would give each claimant a separate attorney's fee, and materially impede the assignee in the discharge of his trust. It may also be inquired, what kind of judgment could the appellant recover? Certainly not a judgment against the assignee, payable out of his goods and chattels, nor out of the property assigned, for that would destroy equality in the distribution of an insolvent estate, and inaugurate the race of diligence. No default in discharging the trust is alleged against the trustee; but it is claimed, because the petition avers that enough assets were assigned to pay the debts of the assignor in full, that the appellant is entitled to a personal judgment at law against the assignee. To this we cannot agree. The assignee does not become the beneficiary in person of the property assigned; he simply undertakes the performance of a trust which the law expressly provides for, and is responsible only in the event of neglect or refusal to perform his duty in discharge of the trust. Such trusts are in a peculiar sense subject to equity jurisdiction in the absence of statutory provisions regulating them; and this is because courts of equity can administer entire justice and distribute all the funds in their proper order among all the claimants, upon the application of any of them, either on his own behalf or on behalf of himself and all the other creditors. (Story's Eq., secs. 1036, 1037.)

And an action at law to enforce the claim of a creditor on purely legal grounds, based alone upon the assignment and acceptance of the trust by the assignee, without showing any default upon his part in the performance of his duties, is, in our opinion, without the necessary consideration to

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maintain such an action; besides, such a remedy would be inadequate to give full relief to the creditor.

The relief demanded did not authorize the court of its own motion to transfer the case to equity. (Section 90, Civil Code.)

Section 438, construed in connection with the other sections of chapter 3, *supra*, as well as subsection 2, section 428, directly referred to by it, and in the light of the purposes of the sale of property held in trust as exemplified by the character of claims and interest of the necessary parties that it requires shall be before the court, clearly shows that the terms, "so far as applicable," are used in reference to a distribution of the proceeds of the sale provided for therein, as well as to the sale, and in order to make such distribution a settlement of the trust estate is necessary, and impliedly authorized by that section and chapter. The rules in equity and these statutory provisions unite to sustain the grounds on which we base this opinion.

Whether the appellant is a married woman, and without legal capacity to sue, does not appear in this record. Therefore, we cannot decide that objection.

We are of the opinion that the dismissal of appellant's petition did not prejudice her substantial rights, and for the reasons given the judgment must be affirmed.

 Muldraugh's Hill, Campbellsville and Columbia T. P. Co. v. Maupin.

CASE 20—ORDINARY—NOVEMBER 11, 1880.

 Muldraugh's Hill, Campbellsville and Columbia
Turnpike Co. v. Maupin.

APPEAL FROM TAYLOR CIRCUIT COURT.

2r	101
87	288
87	334
79	101
98	98
79	101
114	752
79	101
123	630

1. The court erred in refusing to require appellee to elect which of the first two paragraphs of his petition he would prosecute. The third contains no cause of action.
2. Evidence of injury to appellee's child should not have been permitted; but as the jury were instructed that they should not find any damages on that account, the judgment should not be reversed therefor. Proof that another bridge was out of repair was error.
3. The professional opinion of a physician as to the extent of appellee's injuries was competent.
4. But the opinion of the witness as to the amount of damages appellee should recover was incompetent.
5. The first and second instructions are erroneous.
6. Appellant is only bound to exercise ordinary care.
7. Notice to a gate-keeper of appellant's that their bridge was out of repair was sufficient.

P. B. THOMPSON, JR., FOR APPELLANT.

1. The demurrer to each paragraph of the petition should have been sustained.
2. Appellant is only bound to exercise ordinary diligence. There is no averment of want of such care. (Sherman & Redfield on Negligence, secs. 18, 351, 6.)
3. The court erred in permitting evidence of injury to appellee's child, and in allowing the physician, Dr. Bass, to put a pecuniary estimate upon the suffering of appellee. Proof that another bridge than that mentioned in the petition was out of repair was incompetent.
4. Instruction number one makes appellant responsible whether it was guilty or not. The second instruction is also erroneous.

JAMES M. WOOD AND RUSSELL & AVERITT FOR APPELLEE.

1. Anticipating that appellant would rely upon the fact that appellee was a good horseman and of sober habits, it was necessary to show that he was encumbered with his child, to meet that phase of contributory negligence.
2. The evidence of Dr. Bass was competent to show the extent of appellee's injuries.
3. Instructions one and two are evidently more favorable to appellant than the law allows.

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4. We think it was competent to prove that another bridge, in close proximity to the one causing the injury, was in bad repair.
5. The damages are not excessive.

D. G. MITCHELL FOR APPELLEE.

1. It was competent to prove that appellee, in his attempt to shield his child from injury, received greater injuries than he would otherwise have done.
2. Both the first and second paragraphs contain a complete cause of action.
3. The instructions contain the law, and are quite as favorable to appellant as was proper.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

We perceive no valid objection to the first or second paragraph of the petition, but the third fails to state any facts whatever. It simply sums up the damages claimed to have resulted from the facts stated in the preceding paragraphs, and prays judgment for the aggregate of the sums claimed in the preceding paragraphs. The demurrer to that paragraph should have been sustained.

We are also of the opinion that the court should have sustained the appellant's motion to require the appellee to elect which of the paragraphs he would prosecute.

The petition plainly shows that the two paragraphs relate to the same occurrence and injury. It is expressly so alleged, and the only difference between them is, that the facts are set out more in detail in the second than in the first paragraph, and gross negligence is alleged in the latter and is not alleged in the former. The evidence required to support one would support the other. The allegation of negligence is sufficient to entitle the plaintiff to recover in an action like this for any degree of culpable negligence that may be established by the evidence.

When the petition shows that several paragraphs relate to the same cause of action, the plaintiff should be required to

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elect to prosecute one of the paragraphs, and the others should be stricken out, unless the plaintiff shall allege that the fact, as stated in one or the other of the paragraphs, is true, but he does not know which of them is true. (Subsection 4, section 113, Civil Code.)

The court should not have permitted evidence of injury to the child to go to the jury; but as they were told they should not find any thing for the appellee on account of such injury, we should not reverse for that error alone. Evidence that another bridge near by was out of repair was also improperly admitted.

Dr. Bass' statement, that if he were examining the appellee for a pension, he would allow him one fourth, we understand to be his professional opinion that his capacity for labor is reduced one fourth by the rupture. This, we think, was competent. The jury cannot be supposed to be familiar with the character of that injury, or to be able, unaided, to properly estimate its effect in impairing the appellee's capacity to earn money, and hence it was proper to allow them to be enlightened by expert testimony. But the witness should not have been permitted to intimate what he regarded as proper compensation for the injury. That was a question for the jury, and on which expert testimony was not competent, nor should he have been permitted to intimate what the damage would be from apprehension of death from the injury.

The first and second instructions are erroneous. The first made the appellant liable without regard to negligence on its part, and the second authorized the jury to give punitive damages if the bridge was in a dangerous condition, and that fact was known to the agents of the company, or

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by *ordinary* diligence could have been ascertained, and they failed within a reasonable time to have the same repaired.

The company is only bound to ordinary care, and is, therefore, not liable at all, unless it failed to exercise that degree of care; and the fact that the appellant's horse, by reason of a defect in the bridge, fell through it, or became entangled with loose timbers thereon, is not conclusive evidence of negligence; nor is the fact that the agents of the company might have discovered the defect, if one existed, by the exercise of *ordinary* care, evidence of gross negligence.

The jury should have been told, in the first instruction, that if the bridge was in a dangerous condition, and that fact was known to any of the agents of the company connected with the repair or general management of the road, including the gate-keepers nearest to the bridge on each side, or by ordinary care might have been known to any of them long enough before the injury to the appellee to enable the company, by reasonable diligence, to repair it, they should find for the plaintiff, unless he was guilty of negligence which directly contributed to the accident.

And they should have been told, in the second instruction, that if the bridge was in a dangerous condition, and the fact was known to any of the agents designated in the first instruction, and the company failed for an unreasonable time after such knowledge to repair it, they might give punitive damages, provided the condition of the bridge was such as to indicate recklessness or a wanton disregard of the safety of persons traveling on the road. (Sherman & Redfield on Negligence, sec. 600, note 2, 3d ed.)

Counsel for the appellant contends that notice to a gate-keeper of defects in the road is not notice to the company,

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because they are not general agents, and it is not their duty to repair the road. In this we cannot concur. Notice may, by statute, be given to the nearest gate-keeper when the road becomes impassable (section 8, chapter 110, General Statutes), and we think notice to them of dangerous defects should be deemed sufficient.

Such of appellant's instructions as were proper were embodied in the court's instructions, and those not given were properly refused.

Neither party asked, nor did the court give to the jury, a criterion of damages. They should have been told that if they found for the plaintiff they should allow him reasonable compensation for expenses in providing trusses (that being the only expense alleged), for loss of time, if any, and for the permanent reduction of his power to earn money, resulting from any injury caused by being thrown from his horse; and that if they found punitive damages, such additional sum as they might deem just and proper, under all the circumstances in evidence.

Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

McGee v. Gill.

CASE 21—ORDINARY—NOVEMBER 13, 1880.

McGee v. Gill.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. Appellee being elected prosecuting attorney of the city court of Louisville on the first Monday in August, 1880, was entitled to hold the office from the first Monday in September, 1880.
2. Where no time is fixed at which the term of office is to begin, the party elected may enter upon the discharge of its duties when he receives his certificate and is qualified according to law.
3. The term of appellee's predecessor expired the first Monday in September, 1880.

C. B. SEYMOUR FOR APPELLANT.

The term of appellee as prosecuting attorney of the Louisville city court does not begin until the first Monday in January, 1881. (Constitution, art. 4, sec. 41; new charter of Louisville, March 3, 1870; Acts 1879-'80, page 27; Gen. Stat., chap. 21, secs. 1, 23; Louisville City charter, sec. 41.)

BIJUR & DAVIE, T. L. BURNETT, AND W. LINDSAY FOR APPELLANT.

1. There can be no question that if the "McDermott bill" of 1880 had not passed the general assembly, appellant's term of office would extend to January, 1881.
2. There is no intention apparent upon the face of that act to cut off one fourth of a faithful officer's term of office. It only extends the term of office of the prosecuting attorney to four years.
3. No new law shall be construed to repeal a former law as to any . . . right accrued or claim arising under the former law. (Gen. Stat., 247.)
4. General terms should be so limited in their application as not to lead to injustice or oppression. (7 Wall., 486; 9 *Ib.*, 407; *Bailey v. Conner*, 11 Bush, 691; *Hardin's Rep.*, 325; Gen. Stat., 684; Constitution, art. 4, sec. 41; *Ib.*, art. 6, sec. 4.)

J. PHELPS, R. F. BAIRD, AND S. A. ATCHISON FOR APPELLEE.

No brief for appellee.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In August, 1878, Henry Clay was elected and qualified as prosecuting attorney of the city court of Louisville, and entered upon the discharge of his duties in the month of

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September following. Having resigned this office before the expiration of his term, the appellant was appointed to fill the vacancy.

At the August election, 1880, the appellee, Charles Gill, was elected prosecuting attorney of the city court, and the incumbent, J. W. McGee, refused to surrender the office, upon the ground that the term for which Clay was elected did not expire until the first Monday in January, 1881.

This petition was then filed by Gill under section 483, Civil Code, asking that he be placed in possession of the office to which he had been elected.

It is admitted by the demurrer to the petition that Clay entered upon the duties of the office on the first of September, 1878, and the duration of his term was two years. It is claimed, however, that he had no right to take possession of the office by virtue of his election until the first of January, 1879, as his term of office did not begin until that period.

The charter of the city of Louisville, adopted in the year 1870, provides: "The city court of Louisville, in said city, shall remain. It shall be a court of record, composed of a single judge; and shall have a clerk, prosecuting attorney, and marshal. The judge shall have the qualifications of a county judge; the clerk of a county court clerk; *the attorney of a commonwealth's attorney*; and the marshal those of a sheriff, all to be elected by the qualified voters of the city at the time and places prescribed by law for holding State elections, and for the *periods* prescribed by the 41st sec., art. 4, of the constitution of the state, except the prosecuting attorney, *whose term of office shall be the same as the marshal's*, and to be elected at the same time. Under this provision of the charter of 1870 the attorney held his office for

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two years; but by the act of February 21, 1880, this provision was amended by making his term four years. This was the only effect of the amendment of February, 1880, and the time for entering on the discharge of the duties of the office remained as if the amendment had not been enacted, unless the act of February, 1880, is to be regarded as a repeal of the act of 1870; and if such a construction is placed upon it, it might well be argued that the incumbent, Clay, was no longer in office, as that act took effect from its passage (except as to the fees of the clerk and marshal), or if not in effect removed from office by this legislation, his term made to terminate in September, 1880, instead of January, 1881. This is upon the theory, that by the act of 1870 he held his office until January, 1881. The only difference between the act of 1870 and that of 1880 is, that in the last named act the words "*except the prosecuting attorney, whose term of office shall be the same as the marshal's, and to be elected at the same time,*" are omitted, and the words "*the prosecuting attorney shall be elected for a term of four years,*" substituted. The act of 1880 purports on its face to be an amendment to the act of 3d of March, 1870, and there is nothing in the amendment indicating a purpose to interfere in any way with the term of office then being enjoyed by the incumbent, and we are asked by mere inference to assume the existence of a legislative intent that must deprive the officer of the right to hold his office during the period for which he was elected. The General Statutes expressly provide that "no new law shall be construed to repeal a former law . . . as to any right accrued, or claim arising under the former law, or in any way to affect . . . any such right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had

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shall conform, so far as practicable, to the laws in force at the time of such proceedings." Adopting this statutory rule of construction, or giving the provision a reasonable and fair construction in arriving at the legislative intent, and it is evident that the act of 1880 extending the term of the attorney for four years did not affect the period at which the attorney should enter upon the duties of his office, and the appellee's right must, therefore, depend on the construction of the charter as we find it in 1870.

The constitution of the state provides that sheriffs "shall be elected on the first Monday in August in every second year, and shall enter on the duties of their office on the first Monday in January next succeeding their election." So a sheriff elected in August, 1878, will enter on the duties of his office on the first Monday in January, 1879, and his term being two years, would expire on the first Monday in January, 1881.

The constitution also provides that judges, clerks, and marshals, of the city court of Louisville, the Lexington city court, &c., shall "hold their office for the *same term* as county judges, clerks, and sheriffs respectively." (Section 41 of article 4, Const.) So the marshal, holding his office for the same term as the sheriff, if elected in August, 1878, would enter on the discharge of his duties by reason of his election on the first of January, 1879, and his term of office would expire on the first Monday in January, 1881. It is evident, therefore, that the sheriffs and marshals, by reason of the provisions of the constitution referred to, enter upon their respective offices on the first Monday in January succeeding their election; and the only question in this case is to determine the legislative intent as to the time at which the prosecuting attorney shall enter upon the discharge of

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his duties; and although Clay may have entered upon the duties of the office in September, 1878, if he had no such right under the city charter, and was a mere usurper from that time until the first Monday in January, 1879, he is, nevertheless, entitled to continue in office until the expiration of the term fixed by the charter.

The similarity of the duties devolving on the judge, clerk, and marshal of the city courts to those required to be performed by the county judges, clerks, and sheriffs of the state, induced the framers of the constitution to regulate their terms of office as provided by that instrument; and following the constitution, the framers of the charter for the city of Louisville, by the act of 1870, provided that the judge should possess the qualifications of a county judge; the clerk of a county clerk, and the marshal those of a sheriff; and although not required by the constitution, it was also provided that the prosecuting attorney should *possess the qualifications of a commonwealth's attorney*, and then proceeded to prescribe the time for which they should hold their offices—that of the judge, clerk, and marshal for the *periods* prescribed by the 41st section of article 4 of the constitution; and as no term was prescribed by that instrument for the prosecuting attorney, his *term* of office *shall be the same as the marshal's*; not the *same term*, but the term of office; the duration of time shall be the same, and is equivalent to saying that his term of office shall be two years from and after his election and qualification. The case of *Stevens v. Wyatt* (16 B. Monroe), although not analogous in many respects to the question involved in this case, is a guide to the rule of construction by which it must be decided. The duration of time was alone the question to which the attention of the framers of the act of 1870 was

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called, and not the period at which his duties should commence. Although the terms of the judge and clerk were for a longer period, their election and that of the prosecuting attorney would occur at the same time in every fourth year, and there could have been no reason in permitting the judge and clerk to qualify as soon as they received a certificate of their election, and postpone the right of the attorney to a period four months later. It is plain that such was not the intention of the legislature; but, on the contrary, that he should enter on the duties of his office when he receives his certificate of election, and is qualified, unless otherwise regulated by law. In arriving at a proper construction of this provision of the charter, the object in view must be considered, and the relation of the officers of the court, the one to the other, and the reason, if any, the meaning being dubious, for associating the attorney with the marshal in the same term, thereby excluding him from qualifying with the judge of the court, whose duties are so intimately connected with that of the attorney. The court should adopt that construction the most convenient and just to all parties interested; and this has been done not only by the court below, but by the attorney represented by the appellant, who qualified in September succeeding his election. We think, however, the language of the provision of the charter in question evidences plainly the legislative purpose. Where no time is fixed at which the term of office shall begin, the party elected may enter on the duties of his office when receiving his certificate, and qualifying according to law.

The General Statutes, in section 2 of article 11 of chapter 33, provides, that "the term of office of every officer, not otherwise provided for, shall commence on the first Monday

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of September next after his election." This may refer to county and state officers, police judges, &c., and not to a prosecuting attorney of the city court; yet as the term must have a beginning, and the duration of the term is fixed, we see no reason why this statute should not apply.

Judgment affirmed.

CASE 22—EQUITY—NOVEMBER 20, 1880.

McCann's ex'r v. Bell.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

1. Where a note is executed for land, and is not to bear interest until after maturity, the interest stipulated for is no part of the price of the land, but is for forbearance.
2. Unless such note is verified and authenticated as required by the statute, and demanded of the executor or administrator within a year after his appointment, no interest arising after decedent's death can be recovered.
3. The court erred in sustaining the demurrer to appellant's answer.

JNO. A. PRALL FOR APPELLANT.

1. The interest agreed to be paid after the maturity of the note forms no part of the price of the land. It is money to be paid for forbearance by the obligee or his assignee.
2. The appellant's answer avers that appellee failed to verify his demand and present it for payment to appellant within a year after his appointment.
3. The court erred in sustaining the demurrer. The case of *Tousey v. Robinson* (1 Met., 663) is not in point. The statute is founded upon sound policy, and should be construed for the protection of decedents' estates.

BUCKNER & ALLEN AND A. DUVALL FOR APPELLEE.

1. The so-called interest, provided for in the note sued upon, is simply a part of the agreed price of the land sold.
2. The question is substantially decided in the cases of *Tousey v. Robinson* (1 Met., 663), *Boswell v. Clarkson* (1 J. J. Mar., 47). There is no forbearance, but an agreement that enters into and forms a part of the consideration for the land sold.

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CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

These cases, it seems to us, are distinguishable from the cases of *Tousey v. Robinson* (1 Met., 663), and *Gruell v. Smalley* (1 Duv., 358).

In the former case land was sold for \$2,000, payable two years after date, with interest from date, payable semi-annually, at the rate of eight per cent., and it was stated in the bill of exceptions that the eight per cent. claimed to be usury was a part of the contract for the purchase of the land.

The court treated the contract as if the agreement had been to pay, at the end of two years, a sum equal to \$2,000, at eight per cent. per annum for that time equals \$2,320.

In the latter case the court did not enter into any discussion of the subject, but said it was virtually admitted in the answer that the interest stipulated to be paid on the different payments constituted a part of the price of the land.

In these cases the notes do not bear interest until maturity, and as they might then be voluntarily paid, or, if not so paid, payment might be coerced, there seems to us to be no ground upon which to base the conclusion that the interest stipulated for is a part of the price of the land.

In these cases the vendee agreed to pay, and the vendor to receive, certain specified sums, at fixed periods, as the price of the land; and that if the money was not paid at the times designated, interest should be paid *thereafter* at the rate of eight per cent. per annum. This, it seems to us, was the compensation stipulated to be paid for a failure to make prompt payment of the purchase-money, and not a part of the price of the land.

Smith, &c., v. Brannin, &c.

The statute provides (sec. 53, art. 2, chap. 39, Gen. Stat.) that—

“ No interest accruing after his death shall be allowed or paid on any claim against a decedent's estate; unless the claim be verified and authenticated as required by law, and demanded of the executor, administrator, or curator, within one year after his appointment.”

We are therefore of the opinion that the court erred in sustaining the demurrer to the answer.

Wherefore, the judgment is reversed, and cause remanded, with directions to overrule the demurrer.

CASE 23—EQUITY—NOVEMBER 20, 1880.

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Smith, &c., v. Brannin, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. Every question presented upon an appeal must be taken to have been disposed of by the decision upon the appeal, unless it be expressly left open for further litigation.
2. When an appeal presents two or more questions, and the members of this court are equally divided upon one or more of them, and the judgment is reversed upon other points where there is agreement, the opinion of the judges who agree with the court below in regard to the questions as to which an equal division exists, becomes the law of the case as to such questions.
3. The court below and this court, in the further progress of the case, are bound by it as though all the judges had concurred with the lower court.

HARLAN & WILSON, D. W. ARMSTRONG, AND W. REINECKE
FOR APPELLANTS.

The division of this court upon the former hearing operates as an affirmance as to all questions upon which the division existed. The judgment of the vice chancellor, therefore, stands as the law of this case upon all questions upon which the court differed. (Gen. Stat., 279; Brannin v. Smith, MS. Opin., 1875; Commonwealth

Smith, &c., v. Brannin, &c.

v. Beaumarchais, 3 Cal., 150; Phillips v. Williams, 3 Grattan, 264; Brown v. Crow's heirs, Hardin, 446; McLean v. Nixon, 18 B. Mon., 774; Mason v. Mason, 5 Bush, 193; Macklin v. Crutcher, 6 *Ib.*, 401.)

CALDWELL & HARWOOD FOR APPELLANT.

We hold that the opinion of the two judges (Peters and Pryor) who concurred with the vice chancellor on the former appeal in deciding that, under the several contracts between these parties, the appellants were joint owners with Hughes in the cotton bought by appellees, and that appellees were therefore liable to them, settled the law of this case. (Phillips v. Williams, 5 Grattan, 264.)

BARR, GOODLOE & HUMPHREY AND W. LINDSAY FOR APPELLEES.

The opinion of Judges Peters and Pryor is equal to that of Judges Cofer and Lindsay, and they are equal to each other. Thus the law of the case was at large, so far as the lower court was concerned, and the mandate so treats it, except in a certain event. Phillips v. Williams is not in conflict with this view.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

When this case was before this court on a former appeal, it appeared that in December, 1865, A. B. Montgomery and John Wesley Hughes entered into a copartnership for the purpose of growing a crop of corn and cotton in the year 1866, on the plantation of the former, situated in Washington county, Mississippi known as the "Swift Water" plantation.

That contract provided, among other things, that Hughes should furnish the means for cultivating and securing the crop, and should advance to Montgomery the sum of \$10,000. He was to be reimbursed out of the crop for his outlay in its production, and the residue was to be equally divided between them. The money advanced to Montgomery was to be repaid out of his share of the crop, and after the outlay and advances were paid, each was to control his share as he desired.

Soon after that contract was entered into, Hughes came to Kentucky for the purpose of raising money to enable

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him to comply with his part of its terms. He exhibited it to the appellants, Isaac W. Smith, Billy Smith, Jacob S. Smith, and John Woodson Hughes, and entered into contracts with them, whereby they agreed to furnish him the following sums of money: Isaac W. Smith, \$7,500; Billy Smith, \$3,750; Jacob S. Smith, \$2,500; and John Woodson Hughes, \$5,000, making a total \$18,750. Isaac M. Smith also agreed to and did furnish \$3,750, but withdrew under a stipulation in the contract permitting him to do so, and received the note of John Wesley Hughes, with John Woodson Hughes as surety, for the amount advanced by him, and no further notice need be taken of him.

The money was advanced, as the contract recites, in consideration of an interest in the contract between Montgomery and John Wesley Hughes, whose whole interest in the contract was estimated at \$45,000, and those advancing money were to receive an interest in proportion to the money advanced by them respectively.

The greater part of the cotton grown on Swift Water plantation was shipped to and sold by Brannin & Summers, cotton factors, at New Orleans. In November, 1868, Isaac W. Smith brought this suit in the Louisville chancery court against John Wesley Hughes, John Woodson Hughes, Isaac W. Smith, Billy Smith, A. B. Montgomery, and the firm of Brannin & Summers, and Jacob S. Smith was subsequently made a party. The plaintiff claimed that he and his associates, by their contract with John Wesley Hughes, became part owners of the cotton in proportion to their respective advances, and that Brannin & Summers had wrongfully applied the proceeds of the sale of the cotton to the payment of a debt due them by John Wesley Hughes, and sought to recover his proportion of the price of the cotton.

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Jacob S. Smith filed an answer, in which he adopted the allegations of the petition, and, making it a cross-petition against Brannin & Summers, sought judgment for his interest also. Billy Smith and John Woodson Hughes did not answer.

Brannin & Summers denied that Isaac W. Smith and his associates in the contract with John Wesley Hughes had any interest in the cotton; but on final hearing the vice chancellor held otherwise, and rendered judgment in favor of all the associates against Brannin & Summers for their respective proportions of the proceeds of the cotton. From that judgment Brannin & Summers appealed.

Upon hearing the appeal, the members of this court were equally divided in opinion upon the question whether the Smiths and John Woodson Hughes had any interest in the cotton. Chief Justice Peters and Judge Pryor were of the opinion that the contract between them and John Wesley Hughes made them partners with him, and that the terms of that contract were known and assented to by Montgomery, and that they thus became partners with him also, he owning a one half interest, and John Wesley Hughes and the Smiths and John Woodson Hughes owning the other half, and that Montgomery, having transferred or released all his interest to John Wesley Hughes and the Smiths and John Woodson Hughes, Isaac W. Smith and Jacob S. Smith were entitled to recover against Brannin & Summers their respective interests in the proceeds of the cotton.

Judges Lindsay and Cofer were of the opinion that the contracts gave the Smiths and John Woodson Hughes no interest whatever in the cotton, and that their only right was to an account with John Wesley Hughes, and hence

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that the petition and cross-petition should have been dismissed.

But the whole court concurred in reversing the judgment in favor of Billy Smith and John Woodson Hughes, because not authorized by the pleadings and not asked for by them; and also concurred in reversing the judgment in favor of Isaac W. Smith and Billy Smith for some minor errors, and in the following mandate:

"It is, therefore, considered that said judgment be reversed, and cause remanded, with directions to the court below to give the parties leave to take additional proof, if desired. If no other proof is taken, judgment will be rendered for the two appellees, I. W. Smith and Jacob Smith, for their interest, with the original judgment modified as herein directed, by giving Brannin & Summers their proper credits."

On the return of the cause Brannin & Summers, without any objection being made thereto, filed an amended answer, in which they alleged that they had furnished supplies to the Swift Water plantation in 1866 to an amount exceeding the proceeds of the cotton in contest remaining in their hands; and that they had a right to retain the money to pay for the supplies; and that the Smiths and John Woodson Hughes had consented that the cotton might be so applied.

Billy Smith and John Woodson Hughes answered, and, making their answers cross-petitions against Brannin & Summers, prayed judgment for their interest in the proceeds of the cotton. To this claim Brannin & Summers made the same defense as to the claim of Isaac W. and Jacob S. Smith, and in addition pleaded the statute of limitations.

Additional evidence was taken on all the issues of fact presented by the pleadings, and on final hearing a special

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chancellor, to whom the cause was submitted, dismissed the original and all the cross-petitions, and the Smiths and John Woodson Hughes have appealed.

The first question presented for our consideration is, what was the effect of the equal division in this court upon questions presented by the former appeal?

It is contended by the appellees, that inasmuch as the mandate directed judgment to be entered for Isaac W. and Jacob S. Smith in the event that no additional evidence was taken, and additional evidence was introduced, the case was put at large, and all questions were open for decision as if the case had never been before this court; and this seems to have been the opinion of the learned special chancellor.

We have not been able to concur in this view.

Every question presented upon an appeal must thereafter be taken to have been disposed of by the decision on the appeal (*Davis v. McCorkle*, 14 Bush, 746), unless it be expressly left open for further litigation; and when the case presents two or more questions, and the members of this court are equally divided in opinion upon one or more of such questions, and the judgment is reversed upon other points upon which all agree, the opinion of the judges who agree with the court below upon the questions about which there is an equal division here, becomes the law of the case as to those questions, and is binding upon the court below and upon this court in the further progress of the case, to the same extent as if all the judges had concurred with the court below upon those questions.

Whether the appellants had an interest in the cotton as partners, or as part owners, was a question directly in issue before the vice chancellor, and in this court on the appeal from his judgment. The vice chancellor decided they had

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such interest. This court was divided on that question; and as a majority did not concur in reversing upon that point, it necessarily follows that that part of his decision was affirmed, unless expressly left open for further litigation, or else it cannot be true that all the questions presented by the appeal were disposed of by the final decision of this court in the case.

Whether these appellants had an interest in the cotton depended, first, upon the construction of the writings between them and John Wesley Hughes, and between John Wesley Hughes and Montgomery; and secondly, upon the question of fact whether Montgomery had knowledge of the nature and terms of the contract between John Wesley Hughes and the appellants, and consented, either expressly or by acquiescence, to receive them as partners or part owners with himself and John Wesley Hughes.

This court, by the concurrence of all the judges, in allowing further evidence to be introduced without restriction as to the subjects to which such leave was extended, left every question of fact to further litigation; and additional evidence having been taken as to Montgomery's knowledge of the terms of the contract between John Wesley Hughes and the appellants, and his consent to accept the latter as his partners, that question was open to be decided in the court below upon all the evidence in the record at the last hearing, and is open for review in this court.

But as far as the question depended upon a proper construction of the writings, it was not left open; and whatever may be the opinion of the members of this court, as now constituted, as to the proper construction of these writings, we are as much bound by the opinion of the Chief Justice and Judge Pryor on the former appeal as if that opinion had been concurred in by the whole court.

Munday, &c., v. Baldwin.

CASE 24—EQUITY—NOVEMBER 20, 1880.

Munday, &c., v. Baldwin.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

1. A guardian is appointed for an infant at the domicile of her father at his death in Kentucky. The infant is taken out of this State without the consent of the guardian, and carried to Texas. A guardian selected by her in Texas after she is fourteen years of age cannot sue the guardian in Kentucky for rents of the infant's lands, collected by him here.
2. The infant having a guardian in Kentucky is not a non-resident of the state, as she could not consent to leave it, and the court in Texas had no jurisdiction to appoint another guardian, or to displace the guardian in this state. The infant's domicile is in this State.

C. A. & P. W. HARDIN FOR APPELLANT.

1. The court erred in dismissing appellant's petition.
2. After arriving at fourteen years, the infant had the undoubted right to choose a guardian in Texas.

P. B. THOMPSON, JR., FOR APPELLEE.

The infant acquired no domicile in Texas by being taken there. She could not legally consent to the removal from Kentucky, and, as a result, the court in Texas had no jurisdiction to appoint another guardian, although he was chosen by her. His sureties would not be bound for the money if it were recovered in this suit. (Story's Conflict of Laws, sec. 504; Davis v. McFeet, MS. Opin., October, 1873; Grimes v. Clay, 4 Litt., 6.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

Thomas H. Munday died in 1863, domiciled in Mercer county, in this State. At the time of his death he was a widower, having one child, then only a few months old. By his last will and testament, he gave all his personal estate and the care and custody of his infant child to his maiden sister, Sarah E. Munday.

Miss Munday and her mother seem to have resided together, and the child remained with them up to Miss Munday's death, and for some time afterward remained with the grandmother.

79	121
115	516

79	121
120	283

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In the meantime the appellee, a maternal uncle, was, by the Mercer county court, appointed guardian of the child, and took possession of and rented a small tract of land she inherited from her mother.

In 1875 the wife of the appellant, a paternal aunt of the child, and who resided with her husband in the State of Texas, came to Kentucky, and when she returned the child and its grandmother went with her to that State. In 1876, the child, having reached the age of fourteen, went into the county court of Dallas county, Texas, and chose the appellant as guardian of her person and estate, and he qualified and gave bond as such.

Shortly thereafter he brought this suit in the Mercer court of common pleas against the appellee to recover the sum of more than four thousand dollars in his hands, the proceeds of the rent of the ward's land.

The appellee defended on the ground that the ward had been removed from the State without his consent, and that her domicile is here, and the courts of Texas had no jurisdiction to appoint the appellant guardian of either her person or estate.

The record fails to show that the appellee consented to her removal from this State, and the only question we deem it necessary to decide is, whether the facts we have stated show a change of domicile and consequent jurisdiction in the courts of Texas to appoint a guardian of the ward's person or estate, who is authorized under our statute to demand from a guardian appointed in this state such money or personal property of the ward as may be in his hands.

Sections 16 and 17, article 2, chapter 48, General Statutes, provide in substance, that when there is in this State a guardian of a *non-resident* minor, the guardian of such

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minor, appointed and qualified according to the law of the place where the minor *resides*, may, by petition to the county or circuit court of the county having jurisdiction to appoint a guardian in this state, have an order compelling the guardian here to pay over to such foreign guardian the personal estate of the minor, and the rents and profits of his real estate.

This statute only applies to a foreign guardian whose ward is a *non-resident* of this State.

The appellant is not such a guardian. If he be legally a guardian at all, he is not the guardian of a non-resident minor. The domicile of the father is the domicile of his minor child, and this ward, therefore, once had a domicile in this State. She is yet a minor, and consequently never has been capable of changing her domicile by any act or intention of her own. (Schouler's Domestic Relations, 312 and 412; Forbes v. Forbes, 3 Am. Law Reg., O. S., 255.)

Her guardian has never given his consent that she might change her domicile, and hence we need intimate no opinion as to the effect which his consent, if given, might have had.

Nor need we enter into any discussion of the motives that may be actuating either guardian. The conduct of each is compatible with perfect good faith, and a desire to promote the best interests of the ward, and each has done toward securing her interest and promoting her welfare that which entitles him to her respect and confidence.

Judgment affirmed.

Dohoney, &c., v. Taylor.

CASE 25—EQUITY—NOVEMBER 20, 1880.

Dohoney, &c., v. Taylor.

APPEAL FROM ADAIR CIRCUIT COURT.

1. It is manifest that the widow of the devisor acquired only an estate for life in the lands devised to her by the second clause of the will.
2. The power given to the executors by the seventh clause to sell and convey any portion of the devisor's estate must be construed with the other provisions of the will.
3. The meaning of the testator is, "the executors are vested with the title to sell certain tracts of land I have directed to be sold, without restriction or limitation; but the land devised to my wife is to be sold *after her death*, and the proceeds distributed as directed by me."
4. His intention was to give her a home for life, and that after her death the land should be sold.
5. The widow had no authority to sell any greater interest than her life estate.
6. There is no evidence that appellants consented to or acquiesced in the sale of the lands by the widow.

I. & J. CALDWELL & WINSTON AND W. P. D. BUSH FOR APPELLANTS.

1. By the second clause of the will, the widow took the 115 acres of land for and during her lifetime, and not in fee.
2. The power given to the executors by the seventh clause of the will to sell decedent's lands cannot have any reference to land devised to the widow, for that would deprive her of her estate in the land, if the executors determined to sell it.
3. The widow as administratrix with the will annexed could have no greater power than the executors appointed by the will, if they had qualified.
4. The will must be so construed as to harmonize all its parts (Daniel v. Thompson, 14 B. Mon., 663; Moran v. Dillehay, 8 Bush, 437), and so as to give effect to all its provisions (Baird v. Rowan, 1 Mar., 217; Morse v. Cross, 17 B. Mon., 740; 3 Met., 159), and so as to carry out the testator's intention (Adie v. Cromwell, 3 Mon., 279; 12 B. Mon., 47; 9 *Ib.*, 323; 4 Maddox's Ch'y Rep., 30; Sugden on Powers, 139, 334; 1 Jac. & Walk., 189; 3 Adol. & Ell., 442; 3 Atk., 117).

RHORER & JONES FOR APPELLANTS.

It is clear that Rebecca Wheat, the widow, has attempted to do what could only be done by an administrator with the will annexed after her death. She had no more than a life estate, under the second clause of the will. This she might have lawfully conveyed, but no more. (Sec. 17, chap. 63, Gen. Stat.)

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H. C. BAKER, T. C. WINFREY, AND J. R. HINDMAN FOR APPELLEE.

1. The widow, Rebecca Wheat, as administratrix with the will annexed, intended to convey, and did by her deed convey, the fee-simple title to the 115 acres of land to J. G. Taylor. The deed is not made as widow, but in her fiducial capacity.
2. The second clause of the will gave to the widow an absolute interest in the land. Had the executors qualified, undoubtedly they, with the consent of the widow, could have made a complete title to it. She had, as administratrix with the will annexed, the same power. (Sec. 9, chap. 37, Rev. Stat.; Sec. 9, chap. 39, Gen. Stat.; 8 Bush, 62; 3 Dana, 195; 6 *Ib.*, 117; 2 *Ib.*, 80; 7 *Ib.*, 8; 2 Duv., 27; 8 Bush, 602; Gen. Stat., sec. 13, chap. 39; Rev. Stat., sec. 13, chap. 37; 8 Bush, 602; 4 *Ib.*, 32; *Ib.*, 166.)
3. The devisees knew of the sale, and are estopped to question it. (5 J. J. Mar., 569; 3 B. Mon., 175; 6 *Ib.*, 113; 8 B. Mon., 542; 3 Bush, 490; 6 *Ib.*, 530; 4 Mon., 442; 2 Dana, 11; 6 Mon., 505; 12 B. Mon., 494; *Ib.*, 612; 7 *Ib.*, 180; 7 Bush, 27, 44.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The question involved in this case is, did Rebecca Wheat, the widow and administratrix of her husband, have the power to make the sale and conveyance of the land in controversy to the appellee. Her husband left a will, in which he devised, by the second clause, to his wife Rebecca, a "tract of about 115 acres of land, near the town of Columbia; also certain named lots upon which his dwelling and storehouse stood, together with other lots and improvements," and then proceeded to devise to her his household and kitchen furniture, beds, bedding, &c., farming utensils, cattle, hogs, &c., and concludes by saying, "the foregoing mentioned articles are given to my said wife for and during her natural life, and then to return to my estate, except such of it as may be consumed in its use. I give to my said wife, in addition to the before mentioned property, one third of the proceeds of any personal estate which may remain after paying my debts. This last is an absolute gift." The third clause directs, that "after the death of my said wife, it is my will that all of the estate given to her

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for life, and which may remain, be sold upon a reasonable credit, and the proceeds divided as herein directed." By the sixth clause it is provided, that after the death of the widow "all of my estate remaining is to be sold, and the proceeds to be divided into five equal shares," and to pass to his children named. The seventh clause vests his executors, or such of them as qualify, "with full power to sell, and convey a good title to any part of my estate," and "the title to my real estate is hereby vested severally in my executors, so as to enable them, or either of them, to pass the title thereto to a purchaser or purchasers, but for no other purpose, and to no greater extent." The testator owned several other tracts of land that are mentioned in the will, and directed to be sold by the executors.

The executors named in the will declined to qualify, and the widow qualified as administratrix with the will annexed, and sold the land devised to her, or a part of it, to the appellee, and placed him in possession. The devisees claiming the land in remainder, the appellee filed this petition in equity against the widow and devisees, alleging that the conveyance from the widow was by virtue of the will, and intended to be absolute, and the devisees were asserting title. He asked a construction of the will, and that his title be quieted, claiming the right in the administratrix to sell the fee. The will being filed with the petition, a demurrer was interposed, upon the ground alone that the widow held only a life estate, and had no power to sell under the will or by virtue of her qualification as administratrix with the will annexed. An amended petition was filed during the progress of the litigation, in which it is alleged that the adult heirs knew of the sale made by the widow; that the land sold for its full value, and they have received the purchase

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money. The appellants, the devisees, admit their knowledge of the sale, and say the widow had the right to sell her life estate, but deny receiving any part of the proceeds of sale, or any moneys from the widow, knowing that she had received it from the appellees.

We think it manifest that the widow acquired only a life estate in the lands devised to her by the second clause of the will, and any other construction would divest the widow of any interest in her husband's estate, except the small quantity of personalty devised to her for life.

The power given the executors by the seventh clause of the will to sell and convey any portion of his estate, and vesting them with the title for that purpose, must be construed with the other provisions of that instrument, and does not conflict with a restriction of this power to a sale of the land devised to the widow, after the termination of her life estate. The meaning of the language used is, that you are vested with the title to sell, as herein directed, certain tracts of land I have directed to be sold, without any restriction or limitation; but the land devised to my wife is to be sold after her death, and the proceeds distributed as directed by me. It may be argued, however, that by the same clause of the will, after devising the land and personal estate to his widow, the deviser intended to give her a life estate only in the personal property therein mentioned, as he says: "The foregoing mentioned articles are given to my said wife during her natural life, and then to return to my estate, except such as may be consumed in its use." This evidently was intended to embrace the land as well as the personalty. The devise of the land is included in the same clause, and the testator, after creating the life estate in the wife, proceeds in the same provision to say: "I give to

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my said wife, in addition to the *before mentioned property*, one third of the proceeds of my personal estate remaining after the payment of debts. This last is an absolute gift."

Then follows the third clause, directing that *all of the estate given to his wife for life*, and which may remain, be sold on a reasonable credit, and the proceeds divided as hereinafter directed. This was certainly not intended to apply alone to the household furniture and farming implements, &c., devised to the wife, but embraced the land and all other property devised by the second clause. The testator did not intend to vest the executors with the power to deprive his wife of the use of this land, or make disposition of it whenever in their opinion the interests of the devisees demanded it, but designed it as a home for the wife, requiring it to be held until her death, and then sold, and the proceeds divided between his children and grandchildren in the proportions directed by the will. Such being the proper construction of the will, the widow could only sell her life estate, and as administratrix of the will annexed never could have distributed the fund, because the time for distribution did not arrive until after her death; nor do we see why a testator cannot limit or control the executor as to the time at which his estate may be sold and the proceeds distributed. He doubtless created this life estate in the wife for her benefit alone; still he may have conceived the idea that it would secure to his heirs and distributees a part of his estate at least at her death, and that the postponement of its enjoyment might result to the advantage of the distributees. This reasoning, however, is not necessary to determine the question raised. Here it is endeavored to be maintained that one who could in no event exercise the power to sell at the time provided by the will, can neverthe-

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less exercise such a power, and pass the title before authorized by that instrument. The right to sell and distribute was vested in the executors after the death of the widow, who was qualified as administratrix, and neither the executors, if they had qualified, or the widow, in her representative capacity, could sell until that period arrived. It is true they might sell by the direction of the devisees, and the latter would be estopped to question the title of the purchaser, not because the personal representative had the right to sell under the will, but from the fact that the parties alone interested had directed the sale; and whether the sureties on the executor's bond would be liable in such a state of case, is a question not necessary to be determined.

In the case of *Shields vs. Smith*, reported in 8th Bush, 602, relied on by the appellee, the widow renounced the provisions of the will, and the devise to her was thereby rendered a nullity; and besides, the executors sold the land by the direction of both the widow and devisees.

In the case of *Waller, &c., vs. Logan's heirs*, 5 B. Monroe, the testator devised certain lands to be sold at the death of his widow, who qualified as executrix, and one of the questions was, whether she had the authority to transmit this power to her executors. Her husband died, leaving a will that was probated in Virginia in the year 1877, leaving his wife his sole executrix. She died leaving a will, probated in the same court, in the year 1814. This court, among the reasons given for determining that the purchaser acquired no title, held that as Mary Byrd, the executrix, had no power to make the sale (the power not arising until her death), it could not be delegated by her to her executor.

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Sugden on Powers, side pages 334, 335, says:

"10. Sir Edward Coke lays it down as clear that where there is a devise to A for life, and that after his decease the estate shall be sold, the sale cannot be made during A's life, but must wait until his decease. Mr. Hargrave says this is a doubtful point in the authorities. There was a case before Lord Hardwick, in which he expressed an opinion on this question, which appears to have been overlooked. I allude to *Mordale v. Mordale*, 3 Atk., where the devise was to the wife for life, and after her death the testator willed that the same should be sold, and Lord Hardwick said that the words after her decease were not put in to postpone the sale. However, in a late case before the Court of Exchequer (in which the case of *Mordale v. Mordale* was cited), where the devise was to A (the testator's wife) for life, and after her death a power to trustees to sell and distribute, &c., the court held that the estate could not be sold until after the death of the widow; and, after two arguments, dismissed the bill." (See *Bentham v. Witt's heirs*, 4th Maddox's Chancery Reports, 30.)

The conclusion, therefore, is, that the widow had no authority to sell any greater interest than her life estate. There is no evidence showing that the sale of the absolute title was made by the consent of these appellants, or that they acquiesced in the sale by receiving money from the widow in the distribution, knowing that it was the proceeds of the sale of this land.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

Mix v. Marders' ex'r.

CASE 26—EQUITY—NOVEMBER 23, 1880.

Mix v. Marders' ex'r.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. A party who is making no issue hostile to the claim of a decedent's executor, is a competent witness when offered by a co-obligor who makes a defense against the estate.
2. In a suit by an executor against a principal and surety, the principal makes no defense, and judgment is rendered against him. The surety relies upon usury, and offers the principal as a witness to establish his plea. He is a competent witness.

RUSSELL & HELM FOR APPELLANT.

Whipps, although a co-obligor with appellant, was a competent witness to prove usury on the note. He made no defense, and judgment had been rendered against him before his deposition was read. He does not come within the exception made by subsection 2, section 606, Civil Code.

HARRISON & McGRAIN FOR APPELLEE.

The court erred in permitting the deposition of Whipps to be read as evidence in the case. He is a co-obligor with appellant, and is introduced to prove verbal statements of the decedent in support of appellant's plea of usury. (Subsec. 2, sec. 606, Civil Code.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Mix, the appellant, was the surety of Whipps to Jefferson Marders on a note for three thousand dollars. Marders dying, his executor instituted an action on this note, and the plea of usury was interposed by the surety. On the failure of Whipps to plead, a judgment by default was rendered against him, and on the trial he was introduced as a witness by the surety to establish the claim of usury. The question as to the usury having been heretofore considered, it is now urged, in a petition for a rehearing, that Whipps was not a competent witness, and the judgment should have been reversed on the cross-appeal. Prior to the passage of the law making parties to actions competent witnesses, one

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interested in the issue was excluded, if his interest was no greater than his liability for the costs of the action, and in the absence of any change in the law, Whipps would be incompetent, as his liability for costs to the surety would exist; and as the law now stands, Whipps is liable to Mix for the amount the latter may have to pay; and while this is so, it seems to us that the only interest rendering a party to an action or other person incompetent, where he appears as a witness to testify against the estate of a dead person, he must be testifying for himself, so as to defeat or lessen the claim of the personal representative against him, or increase his demand against the estate. Subsection 2 of section 606, prohibits "any person from testifying for *himself*, concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, a deceased person." In this case there is no issue raised, or any claim asserted by the witness against the estate of the testator. The executor has a judgment for the full amount of the debt, interest, and costs, with the usury included, against the principal, and could have obtained no greater relief if no defense had been interposed by the surety. The issue is alone between the estate and the surety, and no greater liability can be asserted by the estate of the decedent against Whipps than has already been fixed. His testimony neither lessens or increases his liability to Marders' estate; and the fact that he may be liable to the surety for costs does not disqualify him or bring the case within the exceptions made by the statute. It was, in fact, a technical ruling that excluded the witness in such cases prior to the change made in the law; and as the object was to enlarge instead of restricting the rule in regard to the competency of persons offered as witnesses, we see no reason for excluding one offered as a witness, who is

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making no issue hostile to the claim of the estate of the decedent, and when testifying cannot affect the amount of the recovery by the personal representative against him.

The petition is overruled.

79 133
95 534

CASE 27—EQUITY—NOVEMBER 27, 1880.

Fayette National Bank of Lexington, &c., v.
Kenney's assignee.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

H. G. & Co. executed their note to appellant for \$10,000, and two members of the firm also signed their individual names to the obligation. The firm and the individual members became insolvent, and made assignments for the benefit of their creditors.

1. Appellant had no greater rights or equities than if the individual names of the members of the firm had never been signed to the note.
2. If a creditor of a partnership has received his portion of the firm assets, his hands will be closed, and he must wait until the creditors of the individual members of the firm receive an equal amount with him.
3. If the partnership creditors exhaust the assets of the partnership without being paid in full, the individual creditor must receive a like sum from the individual assets; and when this is done, the individual estate remaining will be distributed between all the creditors, partnership and individual, in proportion to the amount of their debts respectively.

BRECKINRIDGE & SHELBY FOR FIRST NATIONAL BANK OF LEXINGTON.

1. If Northern Bank of Kentucky v. Keiser be not good law, the judgment below is wrong, and the holders of the notes would be entitled simply by the firm signature to come in *pari passu* with Kenney's other creditors; and if it be good law, the very distinction it establishes between firm and individual creditors, as respects their rights against the separate estate, necessitates the conclusion that Kenney's individual name to the paper made it his individual debt.

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2. By the use of the terms "severally bound" and "jointly bound," the distinction between the two kinds of liability is recognized. (*Gassom v. Badgett*, 6 Bush, 97; *Parsons on Partnership*, 485.)
3. The rule in England against double proof in bankruptcy, prior to the act of 1869, has never been recognized in this country, and in England was recognized only in the administration of estates in bankruptcy. The English judges refused to apply it to any other cases. (*Ex parte Thornton*, 3 De G. & J., 454; 6 Beavan, 84.)

GEO. W. DARNALL FOR FAYETTE NATIONAL BANK.

1. I insist that the case of the Northern Bank of Kentucky v. Yeiser has no bearing whatever upon this case. In that case the contest was between partnership creditors as such and the individual creditors. If it is admitted that appellants are only the firm creditors of H. Gilbert & Co., then the case referred to is conclusive; but we are creditors of S. P. Kenney, by virtue of his individual signature to our notes.
2. Chancellor Walworth, in the case of *Wilder v. Keeler* (3 Paige, 176), holds that a member of a firm may become bound as indorser or security for the firm, in addition to his partnership liability, and such individual liability will entitle the creditor to make double proof against the partnership assets and against his individual estate on the same claim. (*Smith's Mercantile Law*, 79.) The same rule applies in American bankrupt courts. (6 Blatch. F. C. C., 180; 2 Bankrupt Reg., 121.)
3. Equity will not marshal securities to the prejudice of a creditor entitled to a double fund, when the funds arise from contract. (*Logan v. Anderson*, 18 B. Mon., 120; 10 Bush, 326; 13 *Ib.*, 20.)

M. C. JOHNSON AND C. H. STOLL FOR APPELLEE.

1. The decision of the court in the Northern Bank v. Keiser has been the law of Kentucky for sixteen years. To overturn that decision now would unsettle the distribution of thousands, perhaps millions of dollars, and create enormous litigation.
2. A note given by a firm is the obligation of all the partners, and of each other. It is the several as well as the joint obligation of each of them.
3. It is the boast of equity that there is no bark so tough that it cannot be penetrated in order to get to the substance, to the real facts and essential elements of transactions.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The First National and Fayette National Banks at Lexington discounted, each, certain notes signed by the firm

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of H. Gilbert & Co., Thomas Mitchell, and S. P. Kenney.
The notes read :

"\$10,000. LEXINGTON, KY., Dec. 11th, 1877.

"One hundred and twenty days after date we, or either of us, jointly and severally, promise to pay to the order of the Fayette National Bank ten thousand dollars, with interest at the rate of eight per cent. per annum, from date until paid, without defalcation, for value received, negotiable and payable at the Fayette National Bank of Lexington, Ky.

(Signed),

"H. GILBERT & Co.,

"THOS. MITCHELL,

"S. P. KENNEY."

Thos. Mitchell and S. P. Kenney, whose names appear to these notes, were both members of the firm of H. Gilbert & Co. S. P. Kenney, on the 11th of March, 1878, executed a deed of trust to the appellee, J. H. Shropshire, for the payment, *pro rata*, of his creditors "in the order and with the preference only prescribed by law as to the liens of individual and partnership creditors." About the same time the firm of H. Gilbert & Co., becoming embarrassed, by an agreement with creditors, assigned to the appellee the firm effects in trust, for firm creditors. In making a distribution of the assets of the firm of H. Gilbert & Co., the appellants, the Fayette National Bank and others, presented their claims, and received a *pro rata* dividend amounting to 31 per cent. The trustee Shropshire (appellee) having filed his petition in equity for the settlement of these trusts, the appellants, after receiving their dividends of the firm assets, presented their claims, and demanded of the assignee, Shropshire, their *pro rata* dividend of S. P. Kenney's assets in the distribution to be made to his (Kenney's) individual creditors. It is admitted that the individual estate of Kenney will only

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pay about 30 per cent. upon the claims against it, and as the appellants had received from the firm of H. Gilbert & Co. a greater dividend, the individual creditors of S. P. Kenney insisted that appellants could take nothing from Kenney's individual assets until the individual creditors had received as great a dividend as had been paid the appellants out of the firm assets. The chancellor below adjudging in favor of the individual creditors, the case is here on an appeal from that judgment.

It is insisted by counsel for the appellants, that as the individual signatures of Mitchell and Kenney appear to these notes, that the obligation imposed on them both a partnership and an individual liability; "that the holders of the notes possess all the equities of both partnership and individual creditors." This is the single question to be considered in this case.

We are met at the threshold of the investigation with the suggestion that the purpose of requiring the individual signatures of two of the members of the firm of H. Gilbert & Co. to the notes was to create both a partnership and an individual liability, so that the appellants could assert all the equities belonging to both classes of creditors. What the intention of the parties was at the time these notes were executed is to be gathered alone from the face of the instrument, and an agreement to the effect that the individual estate of the members of the firm should be liable will not be permitted to affect the equities of either partnership or individual creditors. If in a firm liability the firm creditor has received his part of the firm assets, the chancellor will close the hands of such a creditor until the individual creditor is made equal with him; so the question at last is, was this, as between the parties to the paper, the debt of the

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firm? This court, in the case of the Northern Bank of Kentucky v. Keiser (2 Duvall), says: "It is not true, as sometimes said, that the claims of these relative priorities is that the partnership creditors trust the partnership property, and the individual creditors trust the individual property." The truth is, that each class of creditors look to both classes of property, and unless they conflict, each have a right to subject both the individual and partnership property." That the individual creditors of Kenney regarded the solvency of the firm and its business capital as an additional security to their claims to the extent of Kenney's interest in the firm, and the appellants looked to the individual as well as the firm assets for the payment of the several notes, we think are facts that may be safely assumed.

There was certainly no lien created on the individual estate of Kenney by his signature to the notes, upon which distribution is sought, nor is it questioned that the parties had the right by contract to create liens that the chancellor could not impair or disregard, or strengthen their claims by having the name of a stranger to the firm as surety; but it is maintained that although Kenney is individually liable, because he is a member of the firm; still there is a legal right, or an equity, arising in favor of the partnership creditors in this case that would not have existed in the absence of Kenney's individual signature. It is conceded that a several and joint liability exists by reason of the firm signature, and that Kenney's individual estate could be subjected to the payment of the several debts, as well as his interest in the partnership; but having evinced a purpose to make himself individually liable, and appellants having accepted the notes with Kenney's individual signature to them, that such a liability might be created, it is urged that he must be

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regarded in this equitable distribution of assets as both a partnership and an individual debtor. This we think he was without signing his name to the paper, and that the appellants were both partnership and individual creditors; but when, at their own instance, they were subrogated to the rights of the partners, and given an exclusive lien on the assets of the firm for the payment of their debts, when asking equity they will be required to do equity.

The chancellor would be reluctant to adopt such an unjust and unequal principle of distribution if no equitable rule existed with reference to the marshaling of assets; and when, by reason of the lien of the partners, courts of equity have worked out a lien for partnership creditors, and when asked to do so gives them a preference, because they were debts owing by the firm, and on condition that they should not participate in the distribution of the individual assets until the individual creditors, if any, are made equal with them, we are asked to discard this rule, and create other equities, for no other reason than that the individual name of a member of the firm appears to the note. The same obligation exists to pay, and the same assets, firm and individual, are liable in either case, with or without the individual signature, and no conflict as to rights arises until the appellants have enforced an equity that gives them all the partnership assets to the exclusion of the individual creditor, and now insist that the equity of the individual creditor is gone by reason of the agreement that the debtor was to be individually liable. That this is a partnership debt is evidenced by the fact that it has been presented to the commissioner or assignee, and the firm assets applied to its payment, and this, together with the position in which the names appear on the paper, authorizes such a conclusion. If the

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notes had been signed by each individual partner, reciting that it was for the benefit of the firm, could there be any doubt as to its being a partnership liability, and subject to all the equities of the partners in the disposition of the firm assets? The obligee, in such a case, if he desired, could assert his lien through the partners, and having done so, the chancellor would not give him this preference, and then permit him to share in the distribution of the individual assets without accounting for what he had received from the firm. It is immaterial how the partner's name gets on the paper; if it is a partnership debt, and the firm primarily liable as between it and the individual partner, it is a firm liability, and if the creditor asserts his claim against the assets of the insolvent firm, he will be estopped to say that the equity of the individual creditor is to be disregarded, or that such an equity never existed, because the individual signing made the individual partner liable, either as principal or surety. A court of equity delighting in equality would strive to prevent such a distribution instead of seeking a mode for obtaining it.

Whether or not the rule in England against double proof in the administration of bankrupt estates is recognized as authority here, is not material to inquire. It is certain that, under the rule established in the case of the Northern Bank of Kentucky v. Keiser, 2 Duvall, the firm creditor is entitled to distribution out of the individual estate of the debtor after the individual creditor has received as much as the firm creditor. The rule established in that case is:

1. That each partnership creditor, on the equitable principle of subrogation, is entitled to the same lien the partners have.

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2. They are not compelled to assert, but may waive that priority, and thereby leave the whole estate subject to all creditors alike.

3. If the partnership creditors exhaust the partnership assets without being paid in full, the individual creditor has the right to make a like amount out of the individual assets, and when this is done, the individual estate remaining will be distributed among all the creditors (partnership and individual) in proportion to their respective debts.

This rule does not apply, of course, where the creditor has obtained liens by contract, or where strangers to the partnership are sureties for the firm, the chancellor having no greater right to disturb such liens and contracts than the common law judge; but one partner will not be allowed, by becoming a surety for a firm debt, to change the equitable doctrine of subrogation, so as to give the partnership creditor all the firm assets, and then allow him as much of the individual estate of the partners as his individual creditors receive in the distribution. The rule in Keiser's case is both just and equitable; and if the debt is that of the firm, as between it and the individual partners, the position or manner in which the individual name of a partner appears on the paper is immaterial, and will not be permitted to disturb equitable rules so well understood in the settlement and distribution of insolvent estates.

Northern Bank of Kentucky v. Keiser, 2 Duvall; Hibler v. Davis, 13 Bush; Logan vs. Anderson, 18 B. Monroe.

Judgment affirmed.

Stone v. Bohm Brothers & Co.

CASE 28—EQUITY—NOVEMBER 30, 1880.

Stone v. Bohm Brothers & Co.

APPEAL FROM BOURBON COMMON PLEAS COURT.

1. A landlord has a superior lien upon the property of the tenant, specified in section 13, article 2, chapter 66, General Statutes, for one year's rent, due and to become due, against the creditors of the tenant, while such property remains upon the premises, and for fifteen days after its removal, whether the removal be accompanied with a fraudulent intent or not, and without regard to the manner of removal.
2. Not so, however, against *bona fide* purchasers who take the property off the premises.

BUCKLER & PATON FOR APPELLANT.

1. Section 13, article 2, chapter 66, General Statutes, gives the landlord a superior lien on the tenant's property, specified therein, against all persons whatsoever, whether they be creditors or purchasers. If this provision was not intended to change the law as it stood before its adoption, and the character of the lien from what it was under the acts of 1811, 1828, and 1843, it is a useless provision, because the landlord, by other provisions, has the same right he had under the old acts referred to. The substitution of the word "superior" for "exclusive" was not intended to change the character of the lien. It is only the more appropriate word.
2. The policy of the law is to protect the landlord. (8 Anne, chap. 14; 2 Statute Law, 1357; 1 *Ib.*, 639; Craddock v. Riddlesbarger, 2 Dana, 205; *Ib.*, 204; 3 J. J. Mar., 477; 4 Dana, 21; act 9th March, 1843; Beckwith v. Bent, 10 B. M., 95; Rev. Stat., sec. 14, art. 2, chap. 56; *Ib.*, 499; McLean v. McLean, 10 Bush, 167; act January 31, 1871 (Livery Stable Keepers); Stat. Ill., 1868, page 410; 70th Ill., 677.)

JNO. A. PRALL FOR APPELLEE.

1. Appellant had no lien upon the wheat after it had been sold by the tenant and removed from the premises. A proper construction of the statute is against the lien.
2. It has been repeatedly held that a tenant may, during his term, sell his goods and chattels, and the purchaser may hold them in defiance of any lien claimed by the landlord. (2 Dana, 204; 3 J. J. Mar., 477.)
3. Section 11, article 2, chapter 66, General Statutes, solves the difficulty by providing "that the distress warrant or attachment for rent shall

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bind, and may be levied upon, any personal property of the original tenant found in the county, and upon the property of the assignee or under-tenant found on the leased premises."

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellant, Stone, rented his farm to Ware for the year 1876, the rent to become due March 1, 1877.

In July, 1876, Ware removed two hundred bushels of wheat from the premises, and sold it to Neeley & Gass, who paid to him the price of it, except \$96.10, which was on the day of sale garnisheed in their hands by the appellees, Bohm Brothers & Co., to secure a debt due them from Ware.

Two days thereafter appellant Stone sued out an attachment for the rent to become due, and had it levied on the wheat, which was in the possession of Neely & Gass.

They answered the suit of appellees, and alleged the facts stated and their willingness to pay the remainder of the price of the wheat to whomsoever the court should adjudge entitled to it.

The suits were consolidated and heard together. The court adjudged that Neely & Gass should pay the \$96.10 to the appellees, and the appellant appeals from that judgment.

He claims that the \$96.10 should have been adjudged to him, because he had a lien upon the wheat for fifteen days after its removal from his premises.

Our statute—section 13, article 2, chapter 66, General Statutes—after providing that the landlord shall have a superior lien on the produce of the farm and other personal property of the tenant, for one year's rent, due or to become due, contains this clause:

"But if any such property be removed openly from the leased premises, and without fraudulent intent, and not

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returned, the lien of the landlord shall be lost as to it, unless the same be asserted by proper procedure within fifteen days from the day of removal."

This provision is similar to one contained in 8th Anne, chapter 14, and 2d George, chapter 19, except it extends the exception embraced by it further than they did. Under them, in order to preserve the lien on the property after its removal, it was necessary to show that the removal was fraudulent. But under the exception in section 13, *supra*, no fraud need be shown to preserve the lien given by the statute, and this seems to have been the material change which the legislature intended to make by it.

The statute is plain as to the property on which the lien is provided, but against whom and between whom does this lien exist, is the question which lies at the foundation of the case before us. That proposition settled, and the solution is easy.

The lien given by section 13, from which the exception quoted was taken, it will be seen, is upon the *property of the tenant*. The exception authorizing the preservation of the lien by proper procedure within fifteen days from the day of the removal of the property, uses the terms "such *property*," referring to *the property of the tenant*, in designating what property as to which the landlord may preserve his lien for fifteen days. The language of the statute seems to limit the lien to the property of the tenant both before and after removal. But we are not left to construction of the words alone of the statute, except wherein they differ from the words of former similar statutes, from which it was evidently taken, as like statutes have been construed and authority laid down for our guide.

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At common law, the landlord had a lien on the property of the tenant while it remained upon the leased premises, but so soon as it was removed the lien was gone.

It is true that, according to Coke on Littleton, page 161, the landlord might make fresh pursuit when the tenant fraudulently removed the property from the premises to avoid paying the rent, and distrain it for his rent.

But Lord Coke says in that case, if the property were taken, it was deemed to be within the fee by judgment of law.

By the Virginia act of 1748, the landlord was authorized to pursue and distrain the property within ten days after its fraudulent removal, if it had not been *bona fide* sold. The common law lien was extended by this act to ten days after a fraudulent removal of the property; but in that case a *bona fide* purchaser was protected. While the landlord's lien was gradually widening, the extravagant privilege of issuing his own warrant, and the unreasonable and anti-social right of distraining property of strangers that had "lain down and risen up," found upon the premises, were swept away by the first and second sections of the act of the legislature of January 31, 1811. And by it the right of distress was limited to rent reserved and payable in money. These restrictions of the rigors of the common law, were added to by section four of that act, which limited the landlord's exclusive lien to the produce of the farm or premises leased. The statute of 8th Anne, chapter 14, gave the landlord a lien upon *all* the goods and chattels of the tenant on the demised premises. That provision of 8th Anne was restored by our act of February 12, 1828. (*Burket v. Bonde*, 3 Dana, 209.)

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The fourth section of the act of 1811, which is, so far as the persons against whom the landlord's lien existed, the same as our present statute, was construed by this court to mean, that as long as the produce of the farm remained on the leased premises, and the rent was in arrear and distrainable, the produce, being the only species of property on which a landlord then had a lien, could not be taken by *other creditors* until the rent was paid. (3 J. J. Mar., 483, Mitchell v. Franklin, &c.) It was also held in that case, that a tenant during his term could sell his property, and a *bona fide* purchaser could hold it in defiance of any lien claimed by the landlord.

The same doctrine was laid down in the case of Snyder v. Hitt, 2 Dana, 204, in which, speaking of the second section of the act of 1811, the court said: "It gives a landlord a right to distrain the goods of his tenant or sub-tenant *only*, if a tenant shall have made a *bona fide* sale of his goods; *they are not liable to distress, even though they may not have been actually removed* from his ostensible possession." (Hood v. Hanning, 4 Dana, 23.)

A *bona fide* mortgage of the goods of the tenant, while they remained in the tenant's possession, was held in the latter case to have a superior lien to the landlord's.

But as to mortgagees, the legislature, by the act of 1843, rendered their claims inferior to the lien of the landlord; and it was so held in Beckwith v. Dent & Duvall, 10th Ben. Mon., 96, and the law is continued by section 12, article 2, chapter 66, General Statutes.

In the case of Craddock v. Riddlesbarger, 2 Dana, 205, it was held, under the act of 1828, that an officer might make a valid sale, under execution, of the tenant's property

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while it remained on the leased premises, and the purchaser would not be affected by the landlord's claim.

The provisions of the act of 1828, relative to goods of the tenant taken and sold under execution, were declared to afford to landlords a new remedy, *not against their tenants*, but against execution creditors and officers acting under process in favor of judgment creditors of tenants.

The same provision, in effect, is carried into the General Statutes by sec. 16, art. 2, chap. 66. So we have seen that the legislature, beginning in 1843, altered the rule laid down in *Mitchell v. Franklin et al.*, 3 J. J. M., 432; *Snyder v. Hitt*, 2 Dana, 204; *Craddock v. Riddlesbarger*, 2 Dana, 205, and *Hood v. Hanning*, 4 Dana, 23, that the lien of the landlord for rent applied alone between him, the tenant, and the latter's creditors, so far as to give the landlord priority over mortgagees, leaving, however, the rights of other purchasers untouched. This legislation is quite significant. It shows that the attention of the legislature was drawn to the subject of the persons and classes against whom the landlord's lien had been declared to exist, and it only extended his lien against the class of *bona fide* purchasers, denominated mortgagees. If the legislature had intended to include other classes of purchasers, some express provision would have been made to that effect. But instead of doing this, purchasers at execution sales of the tenant's property, are protected from the landlord's lien by section 16, article 2, chapter 66, General Statutes, and the landlord is given his lien upon the *proceeds* of such sale.

In the light of adjudications upon the legislation of this State by our own court, it would seem clear that section 13, article 2, chapter 66, General Statutes, provides a superior lien in favor of the landlord upon the property of *the tenant*,

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specified therein, for one year's rent due, and to become due, against the latter's creditors, while such property remains upon the premises, and for fifteen days after its removal therefrom, whether the removal be accompanied with a fraudulent intent or not, and without regard to the manner of removal.

This construction is in harmony with the decisions of other states upon statutes similar to ours. (*Slocum v. Clark*, 2 Hill, N. Y. R., 475; *Frisbey v. Thayer*, 25 Wend., 306; *Coles & Howe v. Marquand & Freeman*, 2 Hill, 447; *Davis v. Payne*, 4 Randolph (Va.), 333.)

The landlord's lien is a strictly legal right, and not favored in equity. Its extension comes from statutory enactment, and this court cannot, by construction of a statutory provision which is a substantial transcript of former statutes that have been given an established interpretation, depart from their meaning thus determined. Evils may be imagined under either interpretation of the statute contended for in this case; but we find no rule of law which authorizes us to interrupt a well established interpretation with which the law-making power has shown itself familiar and contented.

Wherefore, the judgment is affirmed.

Alexander v. Ellison, &c.

CASE 29—EQUITY—DECEMBER 4, 1880.

Alexander v. Ellison, &c.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

1. Although a vendor may have a lien upon real estate conveyed by him to his son and daughter by deed of record, yet, if he announce to a third party that he had given them the land, and that she might safely loan them money, and secure her loan by a mortgage upon it, and upon the faith of his statement she makes the loan and takes a mortgage, his lien will be subordinated to hers for the payment of the mortgage debt.
2. A party will not be permitted by the chancellor to lead another to believe by his assurances that land is unencumbered, and induce another to loan money upon its security, and afterwards defeat the recovery of the money by asserting a lien of his own, in existence when he advised the loan.
3. When houses situate upon joint property are falling to decay, and one tenant out of his own means makes reparation, he is not only entitled to contribution, but has a lien on the interests of his co-tenants, especially if they refuse, or, being under disability, are unable to consent to bear their share of the expense.
4. If a debtor has a security to which he can resort for indemnity, if he be compelled to pay the debt, such security inures to the benefit of the creditor.

ALEXANDER, BAKER & READ FOR APPELLANT.

1. The judgment is neither warranted by the pleadings, proof, nor prayer for relief.
2. The answers of Thos. S. Ellison and E. S. Ellison are not made counter-claims or cross-petitions against any party whatever. They ought, in this state of case, to recover nothing. (Civil Code, sec. 97, subsec. 1; Cain v. Ray, 8 Bush, 343; Anderson v. Ward, 6 Mon., 419; 14 Bush, 210; 1 Duv., 366; subsec. 4, sec. 97, Civil Code.)
3. The grantor, T. J. Ellison, consented to the mortgage to appellant. He arranged for and contrived it, and it was fully approved by him. Equity will not permit a vendor or grantor to induce others to loan money upon real estate by assertions that it was unencumbered, and afterwards assert against appellant a lien in existence when he caused the loan.
4. Mrs. Hoover alone can take advantage of her coverture. Her co-defendants could not do it; besides, the property was her separate estate. (Hiram v. Griffin, 8 Bush, 264.)

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5. It is a palpable fraud to have money expended upon repairs to houses, to improve the joint estate of appellees, and let Mrs. Hoover escape upon the plea of infancy. Appellant should be substituted to the lien of the adult defendant, E. S. Ellison, for these repairs, without which the property would be comparatively worthless.

HORD & TRABUE FOR APPELLEES.

1. Mrs. Hoover pleads both infancy and coverture to the first mortgage, and coverture to the second. It is also admitted by the pleadings that her interest in the property was separate estate. The mortgages, therefore, are clearly invalid. (Sec. 17, art. 4, chap. 47, Rev. Stat.)
2. Mrs. Hoover's interest in the real estate is no gift. The deed clearly contravenes the proposition.
3. But if it was a gift, the mortgages were not made with the statutory consent of the donor.
4. A power given by a deed or will to sell and convey property, does not confer the power to mortgage. (Kent's Comm., vol. 4, 331; 3 Hill, 366.)
5. The mortgage of the personalty, so far as Mrs. Hoover is concerned, is invalid. Her husband was not a party to it.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

October 24, 1872, T. S. Ellison and his wife, in consideration of "four thousand dollars hereafter to be paid to the parties of the first part by the parties of the second part, *or to be accounted for by them in the final distribution of the estate of the parties of the first part,*" sold and conveyed to their son, E. S. Ellison, and their daughter, Ellen M. S. Hoover, then the wife of J. R. Hoover, property known and described as the "Burksville Male and Female Academy," together with all the land and appurtenances thereunto belonging. The interest conveyed to Mrs. Hoover was declared to be for her separate use.

The deed was acknowledged and recorded on the 30th of the same month, and on the first day of November of the same year, E. S. Ellison and Mrs. Hoover executed a mortgage to the appellant, Mrs. N. G. Alexander, whereby they

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mortgaged to her the property embraced in the deed from T. S. Ellison to secure the sum of \$1,500 loaned them, as the mortgage recites, "for the purpose of repairing the Burksville Male and Female College deeded to them by Thos. S. Ellison and wife."

October 14, 1873, they executed to Mrs. Alexander a second mortgage on the same property, and on certain furniture, &c., in the building, to secure a further loan of \$806.15, made to them.

To a suit by Mrs. Alexander to enforce her mortgages, Mrs. Hoover pleaded that she was an infant when she executed the first mortgage; that she was a married woman when she executed each of them, and that her husband did not unite with her in either.

T. S. Ellison being made a defendant, filed an answer, in which he stated that two thousand dollars of the consideration recited in his deed to his son and daughter—one thousand to each—was given to them as an advancement, and that the remaining two thousand was to be paid by them, and for that sum he asserted a lien on the property, which he claimed was prior and superior to any lien created by the mortgages.

In an amended pleading, Mrs. Alexander alleged, in substance, that T. S. Ellison, being the owner of the Academy property, and desirous to have a school taught therein by his son and daughter, and the daughter's husband, all of whom were professional teachers, but not being able and willing to repair and fit up the property so as to fit it for school purposes, agreed with her and his son and daughter that he would convey the property to them as an advancement, to enable them to borrow money from her to fit up the property, and that the deed to the property and the first

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loan and mortgage were made pursuant to that agreement. She also alleged that the second loan was made for the purpose of improving the property, and to buy furniture, &c., to refit the building, and was made with the consent of T. S. Ellison; that the money loaned by her had been used to repair, improve, and re-furnish the property, and had greatly enhanced its value, and that the property was unfit for use without the repairs, &c., made with the money borrowed from her.

While the action was pending, T. S. Ellison died, leaving a will, which was probated, and his executrix having qualified, the suit was revived against her. She filed an answer, in which she controverted the facts set forth in the amended pleading above referred to.

On final hearing, the court adjudged that the executrix had a lien prior and superior to the mortgage liens of Mrs. Alexander; that the mortgages were void as to Mrs. Hoover, except as to some personal property, and directed the real estate to be sold, and so much of the proceeds of the sale as was necessary for that purpose to be applied to satisfy the judgment in favor of the executrix, and that one half of the residue, if any, be paid to Mrs. Alexander, and the other to Mrs. Hoover.

From that judgment Mrs. Alexander has appealed.

Her counsel contend—

1. That if a lien was retained in the deed for the purchase money, the vendor cannot be permitted to set it up against her in violation of the agreement set up in her amended petition.

2. That although Mrs. Hoover may not be bound by the mortgages, still Mrs. Alexander is entitled to reach her interest in the property through E. S. Ellison, who, if he

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should pay the mortgage debts, will, as they contend, be entitled to a lien on Mrs. Hoover's interest to reimburse him.

The uncontradicted evidence of Mrs. Alexander shows that, before she loaned the money, T. S. Ellison stated to her that he had given the property to his son and daughter; that she told him she would not loan money to them without security, and that in reply he told her he had no money to let them have, but they could mortgage the property and make her safe.

Whether this was before or after the execution of the deed does not appear with certainty, although Mrs. Alexander thinks it was after the deed was made; but she distinctly states that she did not know the stipulations of the deed when she made the loans.

These facts are, we think, sufficient to give her priority. After being told that he had given the property to his son and daughter, and that they could mortgage it to secure the loan, she had a right to rely upon his assurance, and having done so, it would be inequitable to allow him to disappoint her by setting up a prior lien, which will result in the loss of a part, and perhaps all, of the money loaned on the faith of a security, which she had a right, from his statements, to assume would be perfectly good.

If he had made no statement to her she would have been affected by constructive notice, and her lien would have been subordinate to the lien retained in the deed, if there be any; but his statements were calculated to create the belief that he had given the property, and consequently it was unencumbered. He cannot be permitted to say that she had constructive notice of a fact which his statements made to her authorized her to believe did not exist.

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3. It is contended that although the mortgages are void as to Mrs. Hoover, E. S. Ellison, being liable to Mrs. Alexander, would, upon paying the whole debt, be entitled to a lien upon Mrs. Hoover's interest in the property to reimburse him her share of the expenditure for the joint estate; and upon the principles of equitable subrogation she is entitled to enforce his equity against Mrs. Hoover.

The rule which allows a creditor to resort to any security held by one of several debtors for his indemnification, in case he is compelled to pay the debt, is familiar to the chancellor, and it would seem not to be a material circumstance that the person furnishing the security is not himself liable for the debt, nor is it material that the security is one which the debtor has by operation of law rather than by contract.

At the common law if there are two tenants in common, or joint tenants of a house or mill, and it should fall into decay, and one is willing to repair and the other is not, he that is willing to repair shall have a writ *de reparatione facienda*; for owners are bound, *pro bono publico*, to maintain houses and mills which are for the habitation and use of man. (Story's Equity, section 1235.)

Chancellor Kent says: "One joint tenant, or tenant in common, can compel the others to unite in the expense of necessary reparations to a house or mill belonging to them; though the rule is limited to those parts of the common property, and does not apply to fences inclosing wood or arable land. (4 Kent, 370; see also *Anderson v. Greble*, 1 Ashmead, 136; *Adams' Equity*, p. 267; *Wash. on Real Property*, vol. 1., p. 421.)

Whether the writ *de reparatione facienda* could now be resorted to, to compel a recusant tenant to unite in making needed repairs, we need not decide. We only refer to the

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subject for the purpose of showing that the common law recognized the legal obligation of each co-tenant to bear his just proportion of the necessary reparation of houses on the common estate, when one or more desired that such repairs should be made.

That there should be an obligation enforceable in some form seems to be necessary to prevent injustice and wrong, and to grow out of the relation in which the parties stand to each other with respect to the common estate. Whatever injures or benefits one co-tenant is an injury or benefit to all the others. If one makes repairs the others receive a part of the benefits, and they ought not to be permitted, by refusing to unite in making necessary repairs, to compel their co-tenant to bear the whole expense, or to allow his interest to suffer because they are reckless of their own.

Growing out of the community of interest existing between co-tenants are certain well established reciprocal rights and obligations. The possession of one is the possession of all, and one may not buy an outstanding title or encumbrance, and set it up against his fellows. This latter doctrine has been applied by this court even after partition. (*Venable v. Beauchamp*, 3 Dana, 325.)

But it was held in that case, that if the title purchased by one tenant was available, the purchaser was not only entitled to contribution from his co-tenant, but also to a lien on the land for the sum to be contributed.

These principles spring out of the privity between the parties, and the fidelity and good faith which the connection implies.

Upon like principles, it would seem that when houses situated on the joint property are falling into decay, and one tenant out of his own means makes reparation, he should

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not only be entitled to contribution, but should be secured by a lien on the interests of his co-tenants, especially if they refused, or, being under disability, are unable to consent to bear their shares of the expense.

Of course such expenses should be repaid out of the income from the property, when that is practicable.

But in this case that is not practicable. Neither E. S. Ellison nor Mrs. Hoover make any objection to the sale of the property to pay the balance due to the executrix of their father's will, and Mrs. Hoover's interest has now been converted into money, which the court below has ordered to be paid over to her.

The repairs made with Mrs. Alexander's money may be assumed to have increased the value of the property, and it is contrary to natural justice that Mrs. Hoover shall reap the benefit of the repairs by receiving a full share of the purchase money, and refuse to contribute to reimburse her co-tenant, who is liable to Mrs. Alexander for the money expended in making the repairs.

Judge Story, after discussing the rule of the common law in respect to contribution by co-tenants for paying the cost of repairs, says :

"But the doctrine of contribution in equity is larger than it is at law; and, in many cases, repairs and improvements will be held to be not merely a personal charge, but a lien on the estate itself." (Story's Equity, section 1236.)

Whether the cost of improvement could, under any circumstances, be made either a personal charge against a tenant not consenting or under disability, or a lien upon his interest in the estate, we need not now decide. But that necessary repairs should be made a charge on the estate when one co-tenant refuses to join in making them, or, from

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disability, is incapable of doing so, seems to us to be warranted, not only by sound principles of equity, but to be often demanded by the best interest of the non-consenting tenant.

This case presents a striking illustration of the reasonableness and justice of such a rule.

The property, when conveyed to Mrs. Hoover and her brother, was so out of repair as to be unfit for the use to which it was adapted, and to which she and her father and husband designed it to be applied for her benefit. It was conveyed to her as separate estate, and under the statute then in force neither she, nor she and her husband, could encumber it by contract, without the order of a court of equity. (Sec. 17, art. 4, ch. 47, R. S.)

Unless the property could be charged in equity for repairs made by the co-tenant, then it must follow, that unless he was willing to do so at his own expense, the property must remain unfit for use, and worthless to both.

We therefore think we are warranted, upon principles of justice and honesty, in holding that E. S. Ellison will, if he pays the debt due to Mrs. Alexander, have a lien on Mrs. Hoover's interest in the property to secure the contribution she is bound by the rules of the common law to make to him for expenses incurred in making the repairs.

To hold otherwise would leave the property to go to ruin to the injury of both tenants, or to compel the tenant desirous to repair to go into equity to obtain a sale. This he might not desire to do, and it is worthy of grave consideration whether there is not something in the relation of joint owners which forbids that one shall be compelled to sell his interest because of the recusance or disability of the other.

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Nor is it less important to consider whether a tenant under disability is not more likely to lose his estate by compelling his co-tenant to resort to a court of equity to obtain a sale than by allowing him to charge it with a lien.

3. It is a familiar rule in equity, that if a debtor has a security to which he can resort for indemnity in the event that he pays the debt, that such security inures to the benefit of the creditor, who may, if he chooses, resort to it for the payment of the debt.

E. S. Ellison has such a security in the equitable lien existing in his favor on Mrs. Hoover's interest in the property, and has a right to subject it to the extent of one half of the money borrowed of Mrs. Alexander, and used in making necessary repairs on the property.

Wherefore, the judgment is reversed, and the cause remanded for a judgment in conformity to this opinion.

CASE 30—EQUITY—DECEMBER 4, 1880.

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79	157
1131	763

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

1. After a return of "no property" upon an execution, the growing crop of the debtor may be subjected, by a proceeding in equity, to the payment of the debt before the first of October.
2. Although a growing crop is not subject to execution until the first day of October, yet, under the 439th section of the Civil Code, a court of equity, upon the return of the execution, will subject the crop, with due regard to the rights of both creditor and debtor, before that time.

A. DUVALL FOR APPELLANT.

1. The code authorizes the plaintiff, after a return of "no property," to institute his action for the discovery of any money, choses in action, equitable or legal interest, and all other property to which

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the defendant is entitled, &c., &c. (Bank of Louisville v. Barrick, 1 Duv., 51; Blincoe v. Lee, 12 Bush, 358.)

2. It is clear that a court of equity, after such return, will subject the growing crop at any time, having regard to the rights of the parties.

MALCOLM YEAMAN FOR APPELLEE.

1. The statute provides that no growing crop shall be levied or sold under execution, unless severed from the ground, until after the first day of October.
2. If it may be taken under attachment in September, it may be taken in June. Clearly, it never was intended that the plain provisions of the statute should be disregarded under the forms of a proceeding in equity.
3. A crop not severed from the ground is no more subject than the two beds of the house-keeper. The case of Blincoe v. Lee, 12 Bush, 358, is no authority for the proceeding.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellant, having judgment and execution with return of "no property," instituted this action in equity, obtained an attachment, and caused it to be levied September 5th, 1876, upon a growing crop. From a judgment discharging the attachment, this appeal is taken. The correctness of that ruling is the only question for our consideration.

Section 439 of the Civil Code, which authorizes a proceeding in equity on return of "no property," was intended to enable the creditor to subject to the payment of his claim "any money, chose in action, equitable or legal interest, and all other property to which the debtor is entitled." It affords a remedy that did not exist at law, because of the inability of the law court to reach all the interests and property of the creditor by execution, which is the only means by which that court can enforce its judgments.

But it is insisted for appellee that the provision of the statute which forbids the levy and sale, under execution, of a growing crop until after the first day of October, applies to a proceeding like this, and practically operates to exempt

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to the debtor the growing crop up to the time at which an execution may be levied. This, we think, was not the intention of the law-makers. It was designed only to take away the remedy by execution, and not to exempt the property to the debtor, nor to deprive the creditor of any other means of enforcing his demand. If the intention had existed to exempt the property during a certain period, instead of taking away one of the remedies for the enforcement of the demand, the legislature would have expressly declared the exemption or the suspension of all remedy during the period.

There are weighty reasons why the legislature might not be willing that a growing crop should be seized and sold under execution that would not apply to a proceeding in equity to subject the same property. In the latter case the chancellor has the power to so direct the enforcement of the demand as to protect the rights and interest of the debtor as well as of the creditor. But that consideration is immaterial, since no intention to take away the remedy in equity appears in the statute. (*Blincoe v. Lee*, 12 Bush, 358.)

The court erred in discharging the attachment.

Wherefore, the judgment is reversed, and cause remanded with directions for further proceedings.

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CASE 31—ORDINARY—DECEMBER 7, 1880.

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APPEAL FROM HARRISON CIRCUIT COURT.

1. Where the defense is contributory negligence, the proper question for the jury is, whether the damage was caused entirely by the negligence of the defendant, or whether the person injured so far contributed to the injury by his own negligence that, but for it, the injury would not have occurred.
2. Contributory negligence is a defense that confesses and avoids the plaintiff's case, and must be made out by showing not only that plaintiff was guilty of negligence, but that it co-operated with defendant's negligence to produce the injury.
3. Ordinarily, it is the duty of a conductor to warn a passenger known to be occupying a dangerous position, and to cause him to go into a passenger car, and his failure to do so may be equivalent to the consent of the company that the passenger may occupy that position. If the passenger takes his place in the baggage, mail, or express car, without the knowledge or consent of the conductor, he will not be permitted to excuse himself upon the ground that the conductor ought to have discovered him and ordered him out.
4. Railroad companies are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard.
5. The court erred in instructing the jury that no fault on the part of the intestate which did not contribute to the wrecking of the train would authorize them to find for the defendant.

STEVENSON & O'HARA FOR APPELLANT.

1. The decedent, as messenger of Adams Express Company off from duty, had no right to take his seat in the baggage car. His place was in a passenger car.
2. He was guilty of contributory negligence by taking his seat in a more dangerous place, if the train should be wrecked by a collision.
3. The court erred in instructing the jury. (Ky. Cen. R. R. Co. v. Dills, 4 Bush, 593; L. & N. R. R. Co. v. Sickings, 5 *Id.*, 1; O'Donnell v. R. R. Co., 59 Penn., 250; Central Law Journal, 1878; B. & P. R. R. Co. v. Jones, Sup. Ct. Rep., 1877; 4 Bush, 535.)

J. Q. WARD AND C. W. WEST FOR APPELLEE.

1. The decedent, at the time of the wrecking of the train, was in the employment of Adams Express Company, and the appellant had

79	100
80	108
79	100
91	544
79	100
123	838
123	537
79	100
e127	441

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agreed, for a valuable consideration, to carry over its road the express messengers and goods in a car provided by appellant for that purpose.

2. He was killed without any fault or neglect of his own.
3. There is a striking difference between this case and every case in Kentucky wherein it has been held that contributory negligence existed.
4. The court committed no error in its instructions. (N. C. R. R. Co. v. State, use of Price, 29 Md., 421; 33 *Ib.*, 553; 36 *Ib.*, 366; 3 Ohio, 196; 17 B. Mon., 598; 1 Duer, 579; American Law Reg., May, 1875, 271; 20 N. Y., 494; 39 *Ib.*, 228; 58 Maine, Dunn v. G. T. R. R. Co., 591; N. S. R. R. Co. v. Johnson, MS. Opin., Feb., 1881; Gen. Stat., 550; 65 N. Y.; Sedgwick on Damages, 495; 59 Penn., 249; 39 N. Y., 228; Lou. & N. R. R. Co. v. Sickings, 5 Bush, 1; Ky. Cen. R. R. Co. v. Dills, 4 Bush, 593; 9 Bush, 736; 7 *Ib.*, 238; 3 *Ib.*, 11; Lou., Cin. & Lex. R. R. Co. v. Case's adm'r, 9 *Ib.*, 731; 9 *Ib.*, 528.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

June 21, 1876, while one of the appellant's passenger trains was proceeding on its way from Lexington to Covington, it came in collision with a herd of cattle straying on the track, and the engine, baggage, and express car were wrecked, whereby Edwin M. Thomas, then traveling in the latter, was instantly killed.

This action was brought by his personal representative under section 1, chapter 57, of the General Statutes, to recover damages for the loss of the life of Thomas, on the ground that it was caused by the negligence of the agents and employés of the company.

The answer admitted the death of Thomas, but denied the charge of negligence on the part of its agents and employés, and alleged that the decedent was himself guilty of negligence, but for which his life would not have been lost.

A trial resulted in a verdict and judgment for the plaintiff, and the court having refused a new trial, the company has brought the case here for review.

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Upon the question whether the agents and servants of the appellant engaged in running the train were guilty of negligence in not preventing the wrecking of the train, the evidence was conflicting.

The facts touching the alleged contributory negligence of the decedent are about as follows :

He was in the employ of the Adams Express Company, and engaged in running as messenger between Lexington and Covington. On the day of his death he went from Covington to Nicholasville in charge of the express goods on the train. In the evening he started to return to Covington, in order to be there on the following morning to go out again in charge of freight. On his return trip he was not on duty as messenger, but the duty was performed by another. He paid no fare; but, under the agreement between the Express Company and the Railroad Company, the former paid a gross sum for the transportation of its freight and messengers.

There is a rule of the Express Company forbidding any one to ride in the express car except the messenger on duty; and there is also a rule of the Railroad Company that conductors and baggage-masters must not allow any person to ride in baggage, mail, or express cars whose duty does not require them to be there.

The decedent went into the express car, and was riding there when the accident occurred. None of the passenger cars were thrown from the track, and no one in any of them was injured. There was plenty of room in the passenger cars. It did not appear that the conductor knew the decedent was riding in the express car.

The most important questions in the case grow out of the action of the court in giving and refusing instructions.

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In the first instruction given for the plaintiff, the court told the jury, in effect, that no fault on the part of the intestate, which did not contribute to the wrecking of the train, would authorize a verdict for the defendant, on the ground of contributory negligence, and refused to instruct, as asked by the defendant, that it was the duty of the intestate to occupy a seat in one of the passenger coaches, and that if he went voluntarily into the express car, and it was more dangerous to ride in that car than in a passenger car, and that his life was lost in consequence of his being in the express car, they should find for the defendant.

That the intestate was a passenger, and entitled to the privileges and subject to the duties incident to that relation, is not disputed.

When the defense is contributory negligence, the proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have occurred. In the first case, the plaintiff would be entitled to recover; in the latter, he would not. (*R. R. Co. v. Hoehl*, 12 Bush, 41.)

And this rule applies as well when the negligence of the plaintiff exposes him to the injury as when it coöperates in causing the misfortune from which the injury results. (*Doggett v. R. R. Co.*, 34 Iowa, 284; *Colgrove v. R. R. Co.*, 20 N. Y., 492; *R. R. Co. v. Dills*, 4 Bush, 590; *R. R. Co. v. Sickings*, 5 Bush, 1; *McAunich v. R. R. Co.*, 20 Iowa, 345.)

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When a passenger enters a railway train he should take a seat in a passenger coach, if there is room, and if he voluntarily goes to a position of greater danger, and is injured, the question whether he is guilty of contributory negligence, which will defeat his action, will depend upon the nature of the misfortune which resulted in his injury. (R. R. Co. v. Montgomery, 7 Ind., 474.)

Contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence coöperated with the negligence of the defendant to produce the injury.

If a whole train be precipitated down an embankment, or through a bridge into deep water, and a passenger seated in the express car is drowned, his representative will have the same right to recover as the representative of a passenger who was seated in a passenger coach. There could be no pretense for saying that, because the passenger in the express car was more exposed to danger in case of a collision with a train running in the opposite direction than he would have been if he had been in a passenger coach, that he ought not to recover, when it is clear that, as respects the misfortune which actually occurred, his danger was not at all increased by the fact that he was in the express car.

So also of a large class of railroad disasters which result from the giving way of the track, or the breaking of some portion of a car. These are as liable to occur at one portion of a train as at another, and, consequently, a passenger is in no more danger of injury from such accidents in the express car than in a passenger car (O'Donnell v. Railroad Co., 59 Penn., 250); and the fact that he was in that car when the accident occurred would not defeat his right to

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recover, unless, perhaps, the injury should result from some agency in that car which would not have existed in a passenger car.

But there is another class of disasters in which the danger may be greater in the express car than in the passenger car. Express cars are usually in advance of passenger cars, and in case of collision with stock or other objects on the track, or with trains running in an opposite direction, the danger may be greater in the express car.

The question of contributory negligence may be further affected by other facts.

The conductor is, as to the train under his charge, the general agent of the company; and if a passenger be invited by him to occupy a position more dangerous than a seat in a passenger car, and the passenger is injured while in that position, the company could not defeat an action for the injury by a plea of contributory negligence. In such a case the act of the conductor would be the act of the company. (*Burns v. Railroad Co.*, 50 Mo., 139; *Clarke v. Railroad Co.*, 36 N. Y., 135.)

If a conductor require a passenger to occupy a dangerous position, the company would be liable in the same manner as if it had itself given the order.

Ordinarily, it is the duty of a conductor to warn a passenger known to be occupying a dangerous position on the train, and to request him to take a seat in the passenger car, and his failure to do so may sometimes be equivalent to the consent of the company that the passenger may occupy that position. (50 Mo., 139; 36 N. Y., 135.) But he is not bound, at the peril of the company, to know that a passenger is in an exposed position, and unless he does know

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it, the passenger has no right to complain that he was not warned.

It is the duty of passengers to occupy the cars provided for them, and the conductor has a right to presume that they are doing so until he knows the contrary; and if a passenger goes into the baggage, mail, or express car without the knowledge or consent of the conductor, he will not be permitted to urge, as an excuse for remaining there, that the conductor should have discovered him and ordered him back to his seat, but failed to do so. No one can be permitted to justify or excuse his own improper conduct by alleging that it was the duty of another to prevent such conduct on his part.

It seems to us, therefore, that when contributory negligence is interposed as a defense to an action against a railroad company for negligently injuring a passenger, and the supposed negligence consists in the fact that the passenger voluntarily occupied a position in the train which was more dangerous than the position he should have occupied, the nature of the accident causing the injury is to be considered; and if, upon such consideration, it appears that the danger of injury from that particular accident was materially increased by the fact that the passenger was in that particular place, instead of the place he should have occupied, he ought not to recover, unless he was there with the consent of the conductor.

But if the nature of the accident be such that the danger of injury was not enhanced in consequence of the position occupied by the passenger, or if the accident was of such a nature as was as likely to occur in one portion of the train as another, or if he occupied the place with the knowledge

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or consent of the conductor, his right of recovery will not be affected by the fact that he was at an improper place.

Applying these tests to the case before us, we are satisfied the court erred in telling the jury that no fault on the part of the intestate which did not contribute to the wrecking of the train would authorize them to find for the defendant, and in refusing instruction "A" asked by counsel for the appellant.

Counsel for the appellee cite several authorities on this point, but none of them seem to us to bear directly upon the question.

The case which comes nearest to this is *O'Donnell v. Railroad Company*, 59 Penn. St., 239.

In that case it appeared that O'Donnell had been employed by the defendant to work on one of its bridges, and as part of his wages the defendant agreed to carry him to and from his home each day on its passenger train. After he had been thus engaged for near two months, during which time he generally rode in the baggage car, he was injured while riding in that car, in consequence of the giving way of the track.

The trial court charged the jury that if the plaintiff rode in the baggage car by invitation or direction of the conductor, the fact of his being in that car would not affect his right to recover; but such invitation or direction should not be inferred from the mere fact that he had been accustomed to ride frequently in the baggage car with the knowledge and without objection on the part of the conductor. And further, that it was the duty of passengers to occupy the place provided for them; that baggage cars are assigned for baggage and not for passengers, and any one possessed of intelligence sufficient to travel, should be held to know that

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the baggage car is not an appropriate place for passengers, and if a passenger chooses to leave his seat in the passenger cars, and go into the baggage cars, he is guilty of negligence, and if it is shown to the satisfaction of the jury that such negligence contributed in a material degree to his injury, he could not recover.

Commenting on this instruction, Agnew, J., said:

"In view of the evidence, this instruction was erroneous. The plaintiff had been riding in the baggage car twice a day for about two months. Murphy, the conductor, himself admitted that Liston's men (of whom O'Donnell was one) rode frequently in the baggage car without his objecting; that he never ordered them out. When they got on that car they generally remained without objection; that he had no recollection of requesting them to go into the passenger car, and that he had not at any time requested the plaintiff to leave the baggage car. . . . Under these circumstances it cannot be justly said of them, as of ordinary passengers, 'that any one who is possessed of sufficient intelligence to travel should be held to know that the baggage car is not an appropriate place for passengers,' nor to say, although the consent of the conductor to ride there may be inferred from these facts, yet it does not follow that the company is liable, unless it is shown that they were there at the *invitation* or by the *direction* of the conductor. . . . From the evidence in this case, the jury might reasonably conclude that O'Donnell was in the baggage car with the permission of the conductor, and for the benefit of the company, and was rightfully there at the time of the accident."

It is evident from this language that the court did not mean to decide that being in the baggage car would not,

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under any circumstances, be such contributory negligence as would defeat an action by a passenger to recover for an injury sustained while riding in that car. On the contrary, it seems to us clear that the court entertained an exactly opposite opinion. After saying that the instruction was erroneous, in view of the evidence, the learned judge proceeds to state evidence from which the jury might have inferred that O'Donnell was riding in the baggage car, not only with the knowledge and consent, but by the desire of the conductor. The suggestion that the evidence showed that the plaintiff had been riding in the baggage car twice a day for two months, with the knowledge of the conductor, and without objection on his part, shows that the court only meant to decide that the evidence would have warranted the jury in finding that he rode there with the consent of the conductor, and that if he did so, he was not guilty of contributory negligence, and this implies that if he rode there without such consent he was guilty.

In *Dunn v. Grand Trunk R. R. Co.*, 58 Maine, and 10 Am. Law Reg., N. S., 615, the only negligence alleged was, that the plaintiff took passage on a saloon car attached to a freight train, contrary to a regulation of the company forbidding the carrying of passengers on such trains.

The conductor knew the plaintiff was in the car before the train started, but failed to direct him to get off; and after the train started received fare for a first-class passage. The company was held liable on the ground that it was the duty of the conductor to enforce the regulation, and having failed to do so, the company was bound by his acts and omissions, and became, as to the plaintiff, a carrier of passengers, and bound to the same extent as if the plaintiff had been injured on one of its passenger trains.

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In *Edgerton v. N. Y. and H. R. R. Co.*, 39 N. Y., 227, the only negligence imputed to the plaintiff was, that he took passage on the caboose attached to a freight train. The case showed that the company was in the habit of carrying passengers in that way, and as in *Dunn's case*, *supra*, the court held that it incurred the same liability as if he had been a passenger on a passenger train.

In *Carroll v. Railroad Co.*, 1 Duer, 579, it appeared the plaintiff rode in the baggage car with the consent of the conductor.

L., C. & L. R. R. v. Mahoney, 7 Bush, 239, was an action under the third section of the statute for "willful" negligence, and has no application here.

2. The plaintiff offered evidence conducing to prove that the Westonhouse air-brake was more efficient in arresting the progress of a train than the brakes in use on the defendant's train on which the intestate was killed.

The defendant objected and excepted, and assigns that action of the court as error.

Railroad companies are held to a very high degree of care and vigilance in everything that pertains to the security of the lives and limbs of their passengers, and are held liable for even slight negligence on their part.

They are bound to provide a road, and engines and cars, free from all defects which endanger the lives of passengers, and which might have been discovered by the closest and most careful scrutiny of competent men, and to employ competent and trustworthy persons to operate and manage their roads, engines, and cars, but are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard.

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Nor have they discharged their whole duty when they have provided the things just mentioned. They are bound to add to them such apparatus and appliances as science and skill shall, from time to time, make known, and experience shall prove to be valuable in a considerable degree in diminishing the dangers of railroad travel, provided such improvements can be procured at an expense not greater than ought to be incurred to obtain them. (Taylor v. Railway, 48 N. H., 316; Tuller v. Talbot, 23 Ills., 357; Casillo v. Railroad Co., 65 Barb.; Smith v. Railroad Co., 19 N. Y., 127; 2 Redfield's Law of Railways, pages 187, 188, 189, 3d ed.; Ford v. L. & S. W. Railway, 2 F. & F., 730; Meier v. Railroad Co., 64 Penn. St., 230; Steinway v. Railroad Co., 43 N. Y., 123; Caldwell v. New Jersey Steam-boat Co., 47 N. Y., 282.)

We have not anywhere met with a rule by which to determine, in a given case, whether it is the duty of a railroad company to provide a designated improvement for use on its trains.

It is said, in substance, in Taylor v. Railway, *supra*, that the degree of care to be required is not to be measured by the revenues of the company, "but that in fixing a general standard of care and diligence there should not be so much required as to render this mode of conveyance impracticable."

The plaintiff in that case was injured in consequence of the breaking of one of the iron rails in the track. It was shown that the rail was much worn and battered. The question was, whether the company had been guilty of negligence in failing to replace it with a better one.

In such a case we quite agree that the question of due care is not to be measured by the revenues of the company..

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All companies engaging in the transportation of passengers must be required to provide a safe track, and sound machinery and cars, and capable and trustworthy operatives.

These are essential to a reasonable degree of safety; and a company unable to provide them should cease operations.

But it seems to us that it would be unreasonable to require companies of small means and business to provide every appliance or machine that may be found to be valuable in diminishing the dangers of railroad travel, and which may come into general use on the great trunk lines, and lines connecting large cities, and carrying a thousand passengers while others carry a hundred.

To adopt such a rule would be to drive many companies into bankruptcy, and to render it necessary to suspend operations altogether upon others.

In *Smith v. N. Y. & H. Railroad Co.* (19 N. Y., 127), the court, speaking of the rule which requires railroad companies to avail themselves of all new inventions and improvements, the utility of which has been tested, used this language:

"Undoubtedly the rule is to be applied with reasonable regard to the ability of the company, and the nature and cost of such improvements; but within its appropriate limits it is a rule of great importance, and one which should be strictly enforced."

The evidence showed that the defendant company, within the twelve months preceding the accident, had declared a dividend on its capital stock of \$5,000,000. What the amount of the dividend was does not appear.

It also appeared that the cost of the air-brake would have been \$500 for each locomotive, and \$200 for each car, or

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\$12,000 or \$15,000 for all of the company's engines and cars.

The evidence also conduced to prove that the Weston-house air-brake had been fully tested, and its utility proved, and that it was in use on many roads in the United States, and gave general satisfaction.

We are therefore of the opinion that the evidence offered on this point conduced to prove negligence on the part of the company, which contributed to the accident in which the intestate lost his life, and that it was properly admitted.

That we may not be misunderstood, it is proper to remark that we do not intend to decide that a company able to do so is bound always to provide the very best improvement that may be known to practical men, but only that it must provide that which is reasonably good when compared with that which has been proved by proper practical tests to be the best.

Counsel also contend that the evidence was not admissible under the pleadings. The allegation is, that the accident was occasioned by the negligence of the agents, officers, hands, and employés of the defendant.

This was sufficient to admit evidence of every fact conducing to prove that the disaster resulted from either the misfeasance or non-feasance of the company or its agents or servants.

Instructions 2 and 3, given for the plaintiff, seem to be unobjectionable, and the instructions asked by the defendant, but not given, except that marked, were properly refused.

Judgment reversed, and cause remanded for a new trial upon principles not inconsistent with this opinion.

 Brooks, Waterfield & Co. v. Staton's adm'r, &c.

CASE 32—EQUITY—DECEMBER 7, 1880.

Brooks, Waterfield & Co. v. Staton's adm'r, &c.

APPEAL FROM BRACKEN CHANCERY COURT.

1. B. W. & Co. advanced money to W., upon a contract that W. would buy tobacco, prize and ship it to B. W. & Co., who were to sell it on commission, and out of the proceeds indemnify themselves for advances. W. shipped a portion to B. W. & Co., but having received \$1,290 more than he had accounted for, agreed that they might take possession of a lot of tobacco in his warehouse which he had bought for them, prize it, and account for it at the rate of nine dollars per hundred. They took possession, and afterwards W.'s creditors attached it, alleging W.'s insolvency, and that he had preferred B. W. & Co. as his creditors. Held, that the transaction did not come within the act of 1856.
2. From the time the advances were made there was an inchoate right to the property on which the advancements were made, and this right became complete when the creditor, with reasonable diligence, reduced it to possession before other equities intervened.

HALLAM & PERKINS FOR APPELLANTS.

1. The facts do not show that Wiley contemplated insolvency. He was doing precisely what he contracted to do, and was not insolvent.
2. The tobacco may be regarded as having been set apart for the particular purpose of the contract between appellants and Wiley, and as soon as appellants took possession of it their lien was complete, and superior to that of appellees. (*Whitehead vs. Woodruff*, 11 Bush, 214; *Whitaker v. Garnett*, 3 Bush, 411; *Thompson v. Heffner*, 11 *Ib.*, 361; *Bard v. Stewart*, 3 Mon., 72; 51 Ala., 337; 2 Paine's U. S. C. C., 362; 1 Curtis's U. S. C. C., 130; 24 Wend., 169; 49 N. Y., 74; *Newby v. Hill*, 2 Met., 531; *Corn v. Sims*, 3 *Ib.*, 398; 14 Peters, 490; 6 Greenleaf, 51; 23 Wall., 35; 1 Met., 455; 2 *Ib.*, 338; 4 *Ib.*, 215; 2 Duv., 279; 21 Pick., 321.)

No brief for appellee.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellants, commission merchants in Cincinnati, Ohio, and as such, dealers in leaf tobacco, advanced to J. N. Wiley, of Bracken county, Kentucky, a certain sum of money, upon an agreement that Wiley would purchase tobacco, prize and ship it to appellants, who were to sell

87	174
88	401
88	408
87	104
79	174
89	55
89	687
79	174
90	253
79	174
94	458
79	174
117	486

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the same on commission, and out of the proceeds indemnify themselves for advances. Under this agreement, tobacco was purchased by Wiley, and some shipments made to appellants; but Wiley having received \$1,290 more than appellants had realized on the tobacco shipped, the market declining, and appellants being apprehensive that the tobacco then in the hands of Wiley, which he had purchased under the agreement, might be seized by the creditors of Wiley, they, by consent of Wiley, took possession of it in the warehouse of Wiley, July 26, 1876, agreeing to prize and account for it at the rate of nine cents per pound. Subsequent to the time appellants took possession of the tobacco, and after they had prized and shipped a portion of it, appellee and other creditors obtained attachments upon the grounds of Wiley's insolvency, and had them levied upon the tobacco. The court below adjudged that appellants should account for all of the tobacco taken possession of by them on the 26th of July, 1876, upon the ground that this was a preference under the act of 1856, and operated to transfer all of the estate of Wiley for *pro rata* distribution among his creditors.

The only question we will consider is, whether that transaction is within what is known as the act of 1856. That act, as now found in the General Statutes, sec. 1, art. 2, chap. 44, provides that—

“Every sale, mortgage, or assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor, in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the prop-

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erty and effects of such debtor, and shall inure to the benefit of all his creditors."

The intention of this statute was to secure an equal distribution of the estate of a failing debtor among his creditors according to their contract rights. The term "creditor" is to be construed to mean a general creditor as distinguished from a lien creditor, or one having rights growing out of contract which are not common to all. It was not contemplated that contract rights existing at law or in equity should be disturbed, nor that a payment or transfer made in pursuance of an agreement entered into at the time, and on the faith of which money was advanced by the creditor or rights parted with by him, should operate as an assignment of all the debtor's property. The exception in the statute, that it shall not apply to any mortgage made in good faith to secure a debt created simultaneously with the mortgage, is not the only exception. For instance, the payment of the purchase price for land, when a lien has been reserved, and the delivery of a pledge as security for money at the time loaned, have been held not to be within the statute. So that we may not, in this instance, apply the familiar rule of construction that the expression of the one exception excludes, by implication, every other. Instead of enlarging the operation of the statute, it appears to us that the best interests of commerce require that it should be restricted to the narrowest compass consistent with the letter and spirit. It is in conflict with the common law, and with the legislation of the greater number of the states of the Union. This fact should not be overlooked in determining the cases embraced by it.

Before the amendment of this statute, by adding the words "every judgment suffered by any defendant, or any

act or device done or resorted to by a debtor," this court said:

"It has been repeatedly held that the giving of a preference to one or more creditors is not in itself fraudulent as to other creditors; and although the fact is well established that Dunn confessed judgment in favor of these appellants in contemplation of insolvency, and with the design to prefer them to the exclusion of his other creditors, such preference was not unlawful."

The same disposition to limit the statute in its operation is manifested in *Thompson, &c., v. Heffner's ex'r*, 11 Bush, 361, and in *Whitaker v. Garnett, &c.*, 3 Bush, 411.

Under a statute similar to the one being considered, the Supreme Judicial Court of Massachusetts has manifested, in *Mitchell v. Black, &c.*, 6 Gray, 100, a disposition to restrict rather than to enlarge the operation of such statutes. The facts of this case are: B furnished P with means to pay freight on cargoes of coal that P might receive in the course of his business. It was agreed that to secure B, the coal was to be transferred to him, and then consigned to P for sale. A bill of sale was made to B of the coal, but no possession taken by him. P continued to receive and handle the coal as his own until his insolvency, when B took possession. It was held that, as at the time the conveyance was made there was no violation of any provision of the statute, and as possession was taken before proceedings in insolvency were commenced against P, the only interest of creditors was in what might remain after discharging the lien of B. This transaction, though in form a sale, was nothing more than the case of a factor making advances for which he is to have a lien on the goods when they reach his

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possession. In the opinion it is said: "If the sale had been absolute in fact as it was in terms, no one would doubt that they would have had the right to interfere and exercise an exclusive control over it, although there had never been any formal delivery of it. Yet the right of a party, who holds a chattel in pledge or in mortgage, is as strong and available as that of an absolute owner, provided it is followed up and protected by a timely and continued possession."

Manifestly, there is an equity in one who advances money on the agreement and faith that certain property shall be intrusted to him as a security, which does not pertain to a general creditor, or to one who extends credit without reference to any particular fund or property as security. From the moment the advances are made, there is an inchoate right in or to the property on the faith of which the advance was made, and this right becomes complete if the creditor, with reasonable diligence, pursues his right by reducing the property to possession before any other equity has intervened. Such contracts, when the money has been advanced, and before delivery of possession, are partly executed and partly executory. The delivery of possession completes the contract; and if, at the time the contract was entered into, and the advances made, the parties acted in good faith, and there was no insolvency and no design to prefer one creditor to another, the act of possession, when there are no intervening equities, relates back, and the contract is a unit from the time it was entered into and the advances made.

Here the equity of complainants, acquired by the attachment, was subsequent to that of appellants, and to the completion of the contract under which the advances were made, and was obtained with full knowledge of the equity of appellants.

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Something analogous to this occurs when A executes a mortgage to B, which is unrecorded, and, without knowledge of the existence of the mortgage, C extends credit to A, and after knowledge of the existence of the mortgage, obtains an equity by attachment or otherwise. The equity of B is superior to that of C. (*Zaring v. Cox's assignee*, MS. Opin., 1880.)

Upon the same principle proceeds the case of *Newby & Taylor v. Hill & Million*, 2 Met., 530. In that case Newby & Taylor became sureties for Lear under an agreement that they should have, as indemnity, a claim held by Lear against Jackson. The assignment of this claim to Newby & Taylor was by parol, subsequent to which appellees obtained an attachment, and claimed priority over Newby & Taylor by reason of it. In the opinion it is said: "The appellees, as attaching creditors, acquired only a lien upon an equitable right to the debt in the hands of the garnishee. But this equity is subordinate to that acquired by an assignee of the debt whose equitable right was created before the commencement of the action." (*Corn, &c., v. Sims*, 3 Met., 398.)

We are compelled to take notice of the fact that the greater part of the chief products of this state, such as tobacco, corn, wheat, and hemp, as well as cattle, horses, and mules, reach the market through the instrumentalities adopted by the parties to this transaction. The commercial and farming communities were transacting business upon this basis when the act of 1856 was adopted; and when we consider the number and the extent of these transactions, and the sanction they have so long received from those most interested, we ought not to conclude, unless demanded by unequivocal language of the law, that the legislature

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intended to make such a radical change in the manner of doing business as would result from holding this transaction invalid. Wherefore, we conclude that the court below erred in holding the transfer to appellants to be within the act of 1856, and in adjudging that they should account for the tobacco so received by them. Appellants are entitled to hold the proceeds of the tobacco to indemnify themselves for advances, commissions, and expenses. If there is any surplus, it should be distributed according to the rights of the attaching creditors.

Judgment reversed, and cause remanded with directions for further proceedings consistent with this opinion.

Judge PRYOR dissenting.

JUDGE PRYOR DELIVERED THE FOLLOWING DISSENTING OPINION:

As between an attaching creditor and a party to whom possession had been delivered by the debtor under an agreement to do so in satisfaction of his debt, the creditor in possession would have the prior equity; but where the transfer of the title and possession is properly assailed as having been made in contemplation of insolvency, and with a design to prefer creditors, it presents a different question. The statute having been enacted to prevent an insolvent debtor from preferring one creditor to another, should be so construed as to carry into effect the legislative will, and the objection to the opinion of the court is, that in effect it nullifies the statute. That there may be a parol assignment of a chose in action, so as to vest the assignee with an equity, is not doubted; but when moneys have been advanced or loaned to one to enable him to speculate on his own account, under a promise that what he buys shall be sold by the party advancing the money, his transfer of the

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possession after becoming embarrassed, and in contemplation of insolvency, with the design to prefer, brings the case clearly within the act to prevent insolvent debtors from preferring creditors. It is said, however, that the design to prefer does not exist because the debtor is only complying with a promise made at the time he received the money, and the delivery of the property as an indemnity is but the consummation of the agreement. If so, the loan of money under a promise to mortgage certain property, then in existence or thereafter to be acquired, is not within the statute, although the borrower, when ascertaining his embarrassed condition, complies with his promise by executing the mortgage long after the money has been obtained. The same equity exists in the one case that arises in the other, and such transactions caused the enactment of the law preventing unjust preferences. If a lien exists by reason of the contract, of course this lien will be enforced; but as I understand the facts of this case, the appellant had no lien by reason of his advances to enable the borrower to purchase on his own account, and on the failure of the party to comply with his promise, he could be made to answer in damages. This was simply an agreement to indemnify the creditor for the loan of his money by sending him the tobacco purchased to sell on commission.

A promise by the debtor to pay his creditor out of a particular fund gives him no lien, nor does it vest the debtor, when he becomes insolvent, with the right to prefer. An agreement that vests the creditor, at the time the money is loaned, with an equitable title to certain property to secure its payment would not be embraced by the statute, or cases might occur where the period intervening between the loan of the money and the execution of the mortgage or the

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transfer of the property, is of such a short duration as would authorize the chancellor to say that the acts were in effect simultaneous, as where the mortgage was not signed by all the parties at the same moment, or not acknowledged and perfected on the same day; but where a mere promise or agreement is made to mortgage, and the party becoming insolvent makes the preference, although in good faith and with the purpose of complying with his promise, it is nevertheless within the statute, and an equitable distribution should be made.

I therefore dissent from the opinion rendered.

CASE 33—EQUITY—DECEMBER 9, 1880.

Farmer v. Hawkins, &c.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. To obtain the benefit of the exception contained in the act of 1856, the mortgage must have been made in good faith.
2. It must have been made to secure a debt or liability created simultaneously with it.
3. It must have been recorded within thirty days after its execution.

A. J. JAMES FOR APPELLANT.

1. There is no substantial allegation in the pleading of appellee that the assignment was made in contemplation of insolvency. The liability was incurred simultaneously with the mortgage. Hawkins was not, in fact, then unable to pay his debts.
2. There was no intent to defraud creditors. The creditors of Hawkins had notice of the mortgage by the recitals of the deed of assignment. (*Swigert v. Bank of Ky.*, 17 B. Mon., 268; *Bennett v. Titherington*, 6 Bush, 196; *Underwood v. Ogden*, 6 B. Mon., 607; *Ward v. Crotty*, 4th Met., 61; *Gen. Stat.*, 259; 1 Story's Eq. Ju., 387; *Gen. Stat.*, 714; *Thompson v. Heffner*, 11 Bush, 360.)

D. W. LINDSEY FOR APPELLEE.

1. The mortgage from Hawkins to Farmer was not recorded within thirty days after its execution. (*Gen. Stat.*, 490.)

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2. The certificate is insufficient, and though the mortgage may have been recorded, it is not a legally recorded instrument. (*Miller v. Henshaw*, 4 Dana, 330; *Franklin v. Beeker*, 11 Bush, 595; *Broadwell v. King*, 3 B. Mon., 450; *Dougherty v. Kircheval*, 1 Mar., 52; 3 J. J. Mar., 13; *Phillips, v. Clarke*, 4 Met., 348.)
3. The assignee accepted the conveyance to him for the benefit of Hawkins' creditors without notice of appellant's mortgage. (*Hildoburn v. Brown*, 17 B. Mon., 783.)
4. Hawkins was actually insolvent when the mortgage was executed.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The facts in this case are, in substance, these: Hawkins, being insolvent, and liable to Farmer as surety for his (Hawkins') son, on a note for \$500, Farmer loaned Hawkins \$1,000, and surrendered the \$500, and took a mortgage on Hawkins' land for \$1,500.

The mortgage was not recorded nor lodged for record for some months after its date. In the meantime, Hawkins made a general assignment for the benefit of all his creditors, but referring in the deed of assignment to the mortgage to Farmer in such way as to give notice to all claiming under the deed of the existence of the mortgage. In a day or two after the deed of assignment was executed and lodged for record, Farmer had his mortgage recorded. More than six months after the date of the mortgage, Gault, a judgment creditor of Hawkins, brought suit against Hawkins and Farmer for the purpose of having the mortgage to Farmer adjudged within the act known as the act of 1856, now article 2, chapter 44, of the General Statutes.

A mortgage within the act of 1856, though fraudulent in law, is not fraudulent in fact; and although the mortgage may be within the statute as to the antecedent debt, yet to the extent that money was loaned simultaneously with the execution of the mortgage, Farmer is entitled to hold it as

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a security for the repayment of the loan, unless he has lost that right by failing to record his mortgage in time.

The first section of the act provides that every mortgage, &c., made by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as therein provided) in proportion to the amount of their respective demands; "but nothing in this article shall vitiate or affect any mortgage made in good faith to secure any debt or liability created simultaneously with such mortgage, if the same be recorded within thirty days after its execution."

It is contended for Farmer, that as his mortgage was given to secure \$1,000, loaned simultaneously with the execution of the mortgage, and notice of its existence was brought home to Gault and the other creditors before they had perfected their right to the property or its proceeds, he has a right to be preferred for that amount to the extent of the property mortgaged.

It is contended, on the other hand, that as the mortgage was in part to secure an antecedent debt, and, as to that part, was within the statute, and the mortgage not having been recorded within thirty days after it was executed, Farmer has no right to a preference, even for the thousand dollars loaned simultaneously with the execution of the mortgage.

It is clear that, but for the last clause of the section, *supra*, no preference could be allowed for any part of the debt attempted to be secured by the mortgage.

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The mortgage was made in contemplation of insolvency, and with the design to prefer Farmer as to the antecedent debt of \$500, and it operated *ipso facto* and *eo instanti* to transfer all his estate for the benefit of all his creditors in proportion to the amount of their respective demands. Thus far there is no provision for any preference.

The last clause of the sentence does, however, provide for a preference in a given state of case.

But this clause is in the nature of a proviso or condition excepting mortgages under certain circumstances from the sweeping provisions contained in the preceding part of the section. To be within the exception or saving, (1) the mortgage must have been made in good faith; (2) it must have been made to secure a debt or liability created simultaneously with it, and (3) it must have been recorded within thirty days after its execution.

The legislature might have omitted the saving altogether, and thus have deprived a mortgagee of any preference in case the debtor was insolvent, and made the mortgage with the design to apply money or property received thereon to prefer a creditor.

But it saw proper, instead of doing so, to provide that a mortgage made upon a simultaneous consideration shall not be vitiated or affected upon condition that it is recorded within thirty days. This is equivalent to saying that if not so recorded it shall be affected, and the mortgaged property shall pass to the creditors generally with the residue of the mortgagor's estate.

The judgment is in accordance with these views, and must be affirmed.

Yeatman v. Day.

CASE 34—ORDINARY—DECEMBER 9, 1880.

Yeatman v. Day.

APPEAL FROM KENTON CIRCUIT COURT.

1. The judgment was rendered at the September term, 1877, and time was given until the January term following to prepare and present a bill of exceptions. The bill of exceptions, when presented, was a nullity. No authority for giving the time existed when the order was made.
2. An act of the general assembly which was passed after the bill of exceptions had been presented and signed, cannot have the effect of giving validity to a void judicial act. So much of the act of the general assembly, entitled "An act to amend subsection 2, section 337, of the Civil Code of Practice," approved February 27, 1878, as applies its provisions to appeals then pending, or thereafter prosecuted from judgments rendered and exceptions filed before it was passed, is unconstitutional, as an attempt to exercise judicial power.

BENTON & BENTON FOR APPELLANT.

1. The answer of appellee does not constitute a defense to the action, and judgment should have been rendered for appellant because of its insufficiency.
2. The law only requires of a holder of a bill of exchange ordinary diligence; that is, that he shall avail himself of the usual channels of communication in giving notice. (Kent's Comm., sec. 44; 10 S. & M., 333; *Ib.*, 541; 4 Barb., 324; 31 Conn., 396; 33 Cal., 176.)
3. The statutory requirement to personally serve notice is met by leaving it at the indorser's residence or place of business. (14 Wis., 408; 31 Miss., 483; 9 Iowa, 426; 10 Mich., 547; 45 Maine, 516; 4 Duer N. Y., 212; 10 Peters, 579; 9 Wheat., 599; 2 Peters, 102; *Ib.*, 129; 54 Barb., 89.)

JNO. G. CARLISLE FOR APPELLEE.

1. The bill of evidence is no part of the record.
2. When the judgment was rendered no time was asked or given to file a bill of exceptions, but several days afterwards appellant asked and obtained time until the January term to file it. That the bill of exceptions was a nullity is decided in *Scott v. Burroughs*, 13 Bush, 450; *Vandever v. Griffith*, 2 Met., 426.
3. The act of the legislature approved January, 1878, cannot affect the rights of appellee in this case. It cannot legalize a judicial proceeding which was void before it went into effect. (*Cooley on Const. Lim.*, 107; 19 Ill., 226; *Gaines v. Gaines*, 9 B. Mon., 295; 9 Bush, 246.)

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4. The demurrer to the answer was properly overruled.
5. The notice of protest is insufficient. (Reed v. Marsh, 5 B. Mon., 8; Todd v. Edwards, 7 Bush, 89; Neal v. Taylor, 9 Bush, 384.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

Counsel for the appellee insists that the bill of exceptions copied into the transcript is not a part of the record, and as the errors assigned cannot be inquired into without a bill of exceptions, the first inquiry is whether the position of counsel is well taken.

The law and facts were submitted to the court without the intervention of a jury. Judgment for the defendant was rendered September 22, 1877. The plaintiff then excepted; but his exceptions were not then reduced to writing, nor was time given in which to do so. No further order was made in the case until September 27, when time until the first day of the next January term was given to prepare and present a bill of exceptions.

On that day a bill of exceptions was presented, signed, and ordered to be made part of the record.

At the time of the trial of this case the Code (sec. 337, subsec. 2) provided that—

“Exceptions taken during the trial need not be reduced to writing, unless by order of court, until after the trial. At the close of the trial, the party excepting shall, unless further time be given him, prepare his bill of exceptions,” &c.

In *Scott v. Burrows* (13 Bush, 450) we decided, in December, 1877, that the foregoing provision required exceptions to be reduced to writing on the day on which the trial terminated or the judgment became final, unless further time was then given by the court, and that a motion for a new trial having been overruled January 26, and no order made

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giving further time, a bill of exceptions filed February 2 came too late, and could not be considered by this court.

At its next session the General Assembly passed an act amending the above subsection by striking out the words "at the close of the trial," and inserting in lieu thereof the words "during the term at which the judgment becomes final" (Acts 1878, p. 24), and declaring that it should apply to all appeals then pending, or which might thereafter be prosecuted.

The language of that act embraces this case; so that, although the bill of exceptions was not a part of the record when filed, it is made a part of it by the act, unless, as contended, the act is unconstitutional as to cases in which the trial was had before the act was passed.

The simple fact that the act was intended to operate retrospectively is no objection to its validity. This is well settled. But it is an attempt by the legislature to remedy defects in judicial proceedings whereby an order of court, void when made, is declared valid, and a bill of exceptions, not effectual for any purpose, is declared to be legal and valid without giving to the party to be affected by it any opportunity to be heard.

The time within which the court was authorized to sign, seal, and enroll a bill of exceptions, or to extend the time within which to do so, was permitted to elapse. The parties were out of court so far as that matter was concerned. The successful party, knowing that the time for filing a bill of exceptions had expired, was no longer bound, by himself or counsel, to be present in court to see that a proper bill of exceptions was made up. He had no notice that such a bill was to be presented. He was not in any way bound or affected by it when filed. Under the then existing law the

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bill was a nullity, and his judgment could not be reversed on account of any thing it might contain—no matter what it might be.

If the bill of exceptions has any validity, it is derived from the legislative act, and not from the act of the court. That making and enrolling a bill of exceptions in a case tried in court is a judicial, and not a legislative act, is too clear for argument.

No one will contend that the legislature can, by its own direct action, grant a new trial, or peremptorily order a court to do so. But if it can require this court to consider a bill of exceptions which was void without and before the legislative act, it may accomplish by indirection that which it cannot accomplish by direct action.

If we can be required to consider as a part of the record that which was not a part of it when the parties were dismissed from the court, and which is only to be considered because the legislature has so directed, it is obvious that this power of the legislature has no limit except the wisdom and discretion of the legislators, and that if that body so wills, it may require us to receive as part of the record the *ex parte* statement of counsel, or the report of a trial as published in a newspaper. If the judge had no power to certify a bill of exceptions at the time when he undertook to do so, his act was a simple nullity, and, legally considered, such a bill of exceptions is no more a part of the record than the report of the same trial published in a newspaper.

Many statutes have been passed to cure mere irregularities in judicial proceedings. These have generally, though not always, been held to be valid.

But we have not seen any case in which it has been held that a void judgment or order, or judicial proceeding, can

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be rendered valid by a subsequent act of the legislature, unless *Tilton v. Swift*, 40 Iowa, 78, be an exception.

There are many cases which hold otherwise: *McDaniel v. Correll*, 19 Ills., 226; *Richard v. Rote*, 68 Penn. St., 248; *Pryor v. Downey*, 50 Cal., 388; *Denny v. Mattoon*, 2 Allen, 361; *Taylor v. Place*, 4 R. I., 324; *Lewis v. Webb*, 3 Me., 326.

We are therefore of the opinion that so much of the act *supra* as applies its provisions to appeals then pending, or thereafter prosecuted from judgments rendered and exceptions filed before the act was passed, is unconstitutional, as an attempt on the part of the legislature to exercise judicial power, and as depriving the party to be affected by it of his property, without due process of law.

Wherefore, the judgment is affirmed.

CASE 35—EQUITY—DECEMBER 11, 1880.

Louisville Building Association v. Korb, &c.
Davis & Gage v. Louisville Building Association.

APPEALS FROM LOUISVILLE CHANCERY COURT.

1. Under the mechanics' lien law applicable to the city of Louisville, the material men and mechanics asserting liens upon the building erected by Peyton and wife, upon the lot conveyed to them by the Louisville Building Association, have liens superior to the vendors for their work and materials; but having failed to record their liens as required by the statute, they lost their priority as against the Association.
2. Although the lien of Korb, by virtue of his mortgage, is superior to that of the mechanics and material men, on account of their failure to have their liens recorded before he loaned the money to Peyton and wife and took his mortgage, his lien is inferior to that of the Building Association, the vendor of the lot.

79 190
6108 680

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3. The fact that the building was erected after the lot was conveyed to Peyton and wife does not affect the vendor's lien as against a mortgagee whose lien accrued after the house was built.

EMMETT FIELD FOR DAVIS & GAGE.

1. A lien cannot be created upon property to be acquired *in futuro* as against creditors. (Trustees of Caldwell Institute v. Young, 2 Duv. 582; Ross v. Wilson & Peters, 7 Bush, 32.)
2. Under the statute creating a mechanics' lien law in Louisville, the lien is valid against the employer's interest for one year, even though it be not recorded; and the unrecorded lien will not be affected by a subsequent mortgage taken without notice, unless the enforcement of the lien will diminish or defeat the mortgage debt. (Nuner v. Wellisch, 12 Bush, 364; Elliott's Charter of Louisville (acts, &c.), 929; Myers' Supp., 305, sec. 12.)

EDWARDS & SEYMOUR FOR LOUISVILLE BUILDING ASSOCIATION.

Although the building was erected after the lot was conveyed to Peyton and wife, yet the lien of appellees, the Louisville Building Association, is superior to that of the mortgagee. (Elliott's Charter of Louisville.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The Louisville Building Association conveyed to Susan A. Peyton, a married woman, a certain lot or parcel of ground in the city of Louisville, in consideration of the sum of two thousand four hundred and fifty dollars, evidenced by certain notes then executed, and to be paid in monthly installments. A lien was expressly reserved in the deed securing the payment of the purchase money. It appears from the proof and the admission of the appellant (the Building Association) that twelve hundred and fifty dollars of the amount for which the notes were executed was, in fact, money loaned to enable the *feme* to build a house, and formed no part of the consideration for the lots. After the execution of the deed Peyton and wife erected a house on the premises, and executed a mortgage to the appellee Korb, to secure the payment of \$170. Davis & Gage and others had liens for material furnished in the construction of

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the building, and filed a petition in equity, making the vendors of the property and Korb defendants, and sought to subject the property to the payment of their liens. All of the liens were in some manner settled, except the liens of Korb and Davis & Gage. The rights of the parties to this appeal must be determined, to some extent at least, by the construction given the mechanics' lien law applicable alone to the city of Louisville and county of Jefferson. That act, by its first section, provides: "That all persons who shall perform labor or furnish materials, fixtures, or machinery for constructing, furnishing, altering, adding to, or repairing any house, building, mill, &c., within the city of Louisville or county of Jefferson, by or under any employment or contract, express or implied, shall and may have a joint lien upon such house, building, mill, &c., *and upon the interest of the employer, in the parcel of land on which such structure may be situated, and in the previous structure added to, altered, or repaired, to secure the payment of their several demands, which lien shall be prior and superior to all other liens or encumbrances on any such house, building, mill, manufactory, or other structure, and the fixtures and machinery so constructed when the structure is wholly new, and upon any machinery or fixtures, alterations, additions, or repairs to a previous building which are capable of being severed or removed from such previous building without serious injury thereto, and shall be prior and superior to all other liens or encumbrances upon the interest of the employer in the lot or parcel of land built upon, and upon any previous structure so altered, repaired, or added to, created after the commencement of the constructing of the house, building, mill, &c.*"

The second section designates the tribunal in which the liens may be enforced, and the sixth section provides that

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the sale of the property on which the lien exists may be enforced according to equity usage, and in a case where the interest of the employer in the land is not sufficient to satisfy the liens, the court may provide for the sale and removal of the house, &c., when it is wholly a new structure, or of the alterations and additions upon which the lien exists, so far as the same can be removed without injury to the former structure, not owned by the employer, or may rent the same out.

The eighth section authorizes a sale of the interest of the employer and a removal of the building when his title is less than a fee-simple, as a lease for years, &c. The provisions of the statute cited leave no room to question the intention of the legislature, as it is manifest the purpose of the law was to give to the mechanics, material men, &c., a lien on the building constructed by them superior to all other liens; and we see no reason, where the employer is the owner in fee of the property, for withholding from the chancellor the power to sell the entire property and distribute the proceeds according to the rights of the parties, and such, in our opinion, is the spirit and meaning of the sixth section of the act. It is true the chancellor may rent the property or cause the building to be removed; but when such action would result in serious loss to the parties, a sale should be ordered. In this case, however, all the parties have consented to the sale, and the question arises as to the proper distribution of the proceeds, when the sale of the realty, with the dwelling or structure upon it, fails to satisfy all the liens. It is conceded that the vendor is entitled to a superior lien on the land, and the mode of ascertaining his interest, when both the land and structure upon it has been sold, is to require

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the commissioner to ascertain the value of the land at the time of the judicial sale, and that much of the purchase money must be applied to the payment of the vendor's lien. After this is done, the sum remaining is the fund out of which the mechanics and material men are to be paid, and upon which they have a superior lien. This gives to the vendor the full benefit of his lien as against the mechanic, and enables him to assert it upon the indential property sold. The chancellor failed in this case to give the vendor the value of his land, but regulated the amount he was to receive by the sum for which the property sold, ascertaining the value of the building and the value of the land, and distributing the proceeds of sale in proportion to their respective liens. This was error. He should have given the vendor the sum of \$1,000, the value of the land; and the whole having sold for \$2,200, it left a fund of \$1,200 out of which the mechanics were to be paid. This error, however, has not, in this particular case, affected the rights of the parties.

The liens of the mechanics were as follows, viz: Fisher, Leaf & Co., \$140; Frank Crowfoot, \$100; Davis & Gage, \$100; making in all \$340. The vendor was then entitled to all the purchase money except \$340. Fisher, Leaf & Co. have received their money, and are not complaining, and the only question to be determined is the manner in which the liens of Crowfoot and Davis & Gage are to be disposed of, amounting to \$100 each. Payton and wife had executed to them their notes for materials furnished, but no record evidence of their intention to retain a lien was made, as required by law, in the county court clerk's office. The appellee, Korb, had taken a mortgage from Payton and wife on the lot after the house had been constructed, without

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notice of their lien, to secure him in the sum of \$150, and being an innocent purchaser (as decided by this court in the case of Gere and wife v. Curling, 5 Bush, 304), his mortgage lien had priority over the mechanics' lien, and the court below so adjudged, and of this Davis & Gage complain, and also the vendor, the Building Association, the latter insisting that if the mechanics are not entitled to the lien, it cannot be paid to the mortgagee, because the vendor's lien is superior to his. The mechanics or material men claim the lien as against the vendor; and that such a lien exists is not questioned. The mortgagee claims a lien on the lot and house as against the material men, and says that out of the fund set apart as representing the value of the house, his lien is superior to theirs, because he is an innocent purchaser.

The vendor maintains that if such is the case, his lien being superior to the mortgagee's, and there not being a sum sufficient to discharge his lien, that it should be paid to him. This is a novel question. Two of these parties, the vendor and the mortgagee, have liens on the whole property, and the mechanics only on the house, or the fund representing it. If the mechanics' lien is lost, so far as the mortgagee is concerned, when he attempts to enforce his lien, it must be held subordinate to that of the vendor, and we see no escape from the conclusion that, as between the vendor and the mortgagee, the fund must be held to belong to the vendor. The mortgagee cannot be substituted to the rights of the mechanics, because the latter failed to give him notice of the existence of their lien, its only effect being to enable the mortgagee to enforce his lien as against the property in preference to the mechanic; and when he attempts this, he meets with the superior lien of the vendor, that must neces-

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sarily defeat his recovery. There is no transfer of the claim held by the mechanic, or the lien secured by it to the mortgagee, and the equity of the vendor being superior to the mortgagee, he is entitled to the money, and not the mortgagee.

The want of notice to the mortgagee of the mechanics' lien did not make his claim more sacred than that of the vendor, the former having full notice of the vendor's lien at the time his mortgage was executed; and if the mechanic, by his omission to take proper steps to secure his lien, has postponed his claim to that of the mortgagee, it cannot have the effect of advancing the lien of the latter to a position where it becomes superior to the lien for the purchase money. The case must be decided as if the lien of the mechanic had been withdrawn, and the mortgagee left to litigate with the vendor; and the lien of the latter having priority, and the whole sum for which the property sold being insufficient to pay it, the lien of the mechanic, so far as it has been made subordinate to that of the mortgagee, must go to the vendor of the land. There is no privity of contract between the mechanic and the mortgagee, nor has the latter any equitable assignment or transfer of the mechanics' claim or his lien; and the latter having lost his preference by postponing his lien to that of the mortgagee, the contest is between the mortgagee and the vendor as to who is entitled to the fund. The mortgagee is not substituted to the lien of the mechanic, and certainly has not as high an equity as that of the vendor, the latter having the prior lien and the prior equity. To the extent, therefore, that the lien of the mechanic has been made subordinate to that of the mortgagee, the vendor becomes entitled.

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It is maintained by counsel for the mortgagee that the vendor's lien does not attach to the house, as the building was not in existence when the conveyance was executed and the lien retained, and he attempts to assimilate this case to a mortgage on personal chattels, to be thereafter acquired. Such a doctrine was never applied to improvements made upon land after the owner had mortgaged it. The owner of the soil is the owner of the house upon it, and a lien given on the land can be asserted as against all improvements placed upon it, either before or after the lien is created, where the improvements become a part of the freehold. This doctrine is elementary, and the rule with reference to the sale and mortgage of chattels has no application to a case like this.

The judgment is reversed as to the Building Association, and affirmed as to Davis & Gage. Cause remanded for further proceedings.

CASE 36—EQUITY—DECEMBER 14, 1880.

Ormsby, &c., v. City of Louisville.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. An allegation that the ordinances set forth in the petition "were in all respects published as required by law," is insufficient.
2. A publication of the levy ordinances of the city of Louisville on Sunday, and no other day, before seeking to enforce them, is not such a publication as the city charter requires or the law of this state approves. Sunday is not a judicial day, nor is it a day upon which any work, labor, or calling can be legally pursued, unless of necessity or charity. Such publication is of itself a violation of law, and no citizen, by any law of this state, is bound to read or take notice of it.

82	197
83	414
85	11
87	615

79	197
80	117
80	539

79	197
116	878

79	197
116	878

79	197
124	24

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3. Before the contents of the two newspapers could lawfully be proven, their absence should have been accounted for, either by proving their loss or the inability of the appellee, after a *bona fide effort*, to obtain them.
4. The fact that the notices required by the levy ordinances were published should have been distinctly alleged and proved.
5. The description and valuation of the lots sought to be taxed are sufficient.
6. The plea of the statute of limitations as to the years 1869, 1870, and 1871, is good.

R. W. WOOLLEY AND GEO. DURELLE FOR APPELLANTS.

1. The petition does not contain a cause of action. In a direct proceeding against a citizen to coerce the collection of a demand by the sale of his property, it is material to allege and prove every essential step tending to establish the validity of the claim. (Blackwell on Tax Titles, 500, 501, 502, 503, 504; 9 Miss., 878; Cooley on Taxation, 215; 40 Cal., 255; Kniper v. City of Louisville, 7 Bush, 599; Elliott's Dig., 153; act approved 20th March, 1876.)
2. Publication of the ordinances of the city of Louisville is required by the act of its creation before they can be enforced, and the mode of publication is pointed out. A publication on Sunday is void. (Moore v. Hagan, 2 Duv., 438; 20 Johnson, 141; 6 *Ib.*, 326; 3 Penn., 200; 4 Cranch, 193; 16 Mich., 9; Scammon v. City of Chicago, 40 Ill.; Finch Law, 7; Noy's Legal Maxims, 2; 19 Vermont, 358; Prather v. Harlan, 6 Bush, 185; Campbell v. Young, 9 *Ib.*, 240; 12 Met., Mass., 25; 107 Mass., 441; 34 Maine, 391; 1 Grant Pa., 261; 24 Howard's U. S., 374; 19 Mich., 355; 1 Nett & McChord, 137; 32 Cal., 353; Dillon Mun. Corp., 266-7.)

H. M. LANE FOR APPELLEE.

1. Section 107 of the charter of the city of Louisville operates to supersede, within the limits of the city, the statute which makes penal any work or business done on the Sabbath day. (Cooley on Const. Lim., 198; 54 Mo., 35; 1 Dutcher, 54; The State v. Davis (Texas), 2; 38 Mo., 456; 14 Bush, 525; *Ib.*, 224; 12 *Ib.*, 364; 9 *Ib.*, 521; Dillon Mun. Corp., 54; 3 Zabriskie, 484; 33 N. J. L. R., 57; 5 Dutcher, 170; 20 N. J. Eq., 360; 16 Pickering, 504; 18 Gratt., 176; 1 Vroom, 112; 2 Grant's Cases, 455; 12 Ill., 339; City of Louisville v. Commonwealth, 2 Duv., 296.)
2. The publication of an ordinance is not a judicial act.
3. No contract is void simply because it is made on Sunday. (9 Bush., 240; 6 Bing., 653; 13 Ind., 203; 19 Verm., 353; 24 *Ib.*, 317; 21 *Ib.*, 99; 9 N. H., 500; 15 *Ib.*, 576; 3 Watts & Sergt., 445; 7 Bush, 221; 97 Mass., 167; 1 Grant's Cases, 261.)

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JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

By section five of the charter of Louisville, approved March 3, 1870, it is provided that the proceedings of each session of each board of the general council shall be published at least once in one or more of the daily papers printed in Louisville having the largest permanent circulation in said city; and that "all ordinances shall be published in like manner before they are enforced."

By an amendment to the charter of March 3, 1871, section 10, it is provided that "it shall not be necessary for the city council to have published and printed the journal or proceedings of the general council, but all other matters required by the provisions of the charter or ordinances to be printed and published, shall be so printed and published in at least two papers in said city of Louisville having the largest *bona fide* circulation in said city, one of which shall be printed in the English, and the other in the German language."

It will be seen from these references that the annual levy ordinances are required to be published once in at least two newspapers of the largest *bona fide* circulation. Such ordinances are required to be adopted by the city council before taxes can be legally collected, as held in *Boone v. Gleason*, MS. Opin. of this court, 1879.

And we think the charter and amendment quoted make the publication of such ordinances a necessary prerequisite to their enforcement.

We have carefully investigated the authorities cited on all the questions presented for our consideration, and, without referring to all of them specifically, we will give the conclusions at which we have arrived, citing only such as we deem necessary to a correct understanding of this opinion.

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The appellants demurred to the petition generally; their demurrer was overruled, and they excepted.

The petition makes no reference to the publication of the annual ordinances; but after the demurrer to it was overruled, the appellee filed a reply, in which it is alleged that "the plaintiff says that each one of the seven ordinances (*i. e.*, levy ordinances) set up in the petition, each entitled an ordinance concerning taxes, were in all respects published as required by law."

This mode of pleading a condition precedent in a contract was authorized by section 149 of the Civil Code of 1851; but that section was omitted from the Civil Code of 1877, and thereby the rules of pleading, as they existed before the Civil Code of 1851, in such cases, were revived, and the common law rule restored.

A statement of the facts, showing how and when a condition precedent was performed, or giving an excuse for its non-performance, was ordinarily required at common law. (*Averbeck v. Hale*, 14 Bush, 508, and authorities cited; *Newman's Pleading and Practice*, p. 333.)

The averment in the reply did not help the petition, because, to allege that the ordinances were in all respects published as required by law, is a legal conclusion.

The facts in regard to the publication should have been alleged, showing when and how the publication was made, and in what character of newspapers.

The court, therefore, erred in overruling the demurrer to the petition. As the plaintiff should be allowed to amend on the return of the cause, it becomes necessary to decide several other questions raised upon the record, which we proceed to do:

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1st. A publication of the levy ordinances on Sunday, and on no other day, before seeking to enforce them, is not such a publication as the charter requires, or the law of this State approves. It is not a judicial day, nor is it a day upon which any work, labor, or calling can be legally pursued, unless of necessity or charity. Legal process cannot ordinarily be legally served upon Sunday, and there is no reason shown why the publication of an ordinance of the city of Louisville on Sunday should be held as a compliance with its charter requiring publication of such ordinance. The publication is a violation of law, and no citizen is bound by any law known to us to read secular newspapers on Sunday to entitle himself to the benefits which may flow from publications contained in them. If he chooses, he may refuse to read them on Sunday altogether, and none of his legal rights will be thereby forfeited.

2d. Before the contents of the newspapers, the Courier-Journal and Anzeiger, could be lawfully proven, their absence should have been accounted for either by proving their loss or the inability of the plaintiff, after a *bona fide* legal effort, to obtain possession or access to them. This is not a question of the existence of those papers, but as to their contents, and the best evidence of that fact of which it is susceptible should be adduced, and that evidence is furnished by the papers themselves.

3d. The levy ordinance for the year 1873, approved May 28, gave the assessor until June 10th to furnish to the city receiver the tax bills, and the ordinance for the year 1874 gave him until July 1 to perform that duty. By ordinance No. 482 all tax bills shall be due and payable on the first day of June of each year, and shall be listed in proper time with the receiver for collection. Ordinance No. 488 pro-

vided that notice should be published in at least three daily newspapers of the time at which taxes are due, and the place where the same will be received; and unless the notices by publication required by sections one and two of ordinance No. 488 are made at the time and in the manner therein directed, no percentage shall be charged. (Lucas' Digest, 264, 265.) There is no allegation in the petition or pleadings showing that such publication was made; and as the percentage is in the nature of a penalty, it cannot be recovered in this action, and it ought never to be allowed unless the law has been completely complied with by the city. Interest is not allowable upon taxes by way of damages.

4th. Section two of an act approved February 17, 1866, requires that the board of commissioners of taxes and assessments shall cause public notice to be given in two or more daily newspapers in said city, for a space of not less than thirty days, that the assessment rolls of all persons assessed for taxation in said city are then open for examination and correction.

The fact that such notice was published in the manner required by said section should have been alleged and proved.

But in counting the thirty days, Sundays will not be thrown out. The statute does not mean thirty secular days. It is like the service of a summons, which is required to be served ten or twenty days before the beginning of the term. Such service will be in time, although some of the days should be Sunday, provided the service shall not be made on Sunday.

This is very different from publishing the notice on Sunday. If the notice be published thirty days, provided the

first publication is not on Sunday, which is requisite to make the thirty days, it is sufficient, although the publication is not made upon the intervening Sundays, which ought not to be done.

5th. If the assessor knows the property, or takes the assessment from the owner in person, he need not visit the property or take a view of it; and in this case we think that it is sufficiently shown that the property was known to the assessor.

6th. As to the description of the lots sought to be taxed, it is not as full as it might have been; but from the nature of his duties the assessor could not, without great delay and embarrassment, give such a description of the property as is required in a deed or judgment.

It would be unreasonable to require him to do so, and it would tend greatly to prevent the collection of taxes.

A simple tax-roll, laid off into proper columns for the names of the owners, a brief description of the property, its valuation, with appropriate headings, so that a person of ordinary understanding may know what is meant, and the property found on which the assessment is made, is all that is required in any state in the Union.

The number of feet front and depth of the lots, with the name of the street, and the side of the street on which they are located, also the names of the streets between which they are situated, are given, and we think the description sufficient.

7th. The valuation is set down on the roll in perpendicular columns, headed "value per foot," "value of ground," "value of improvements," and "total value."

The value at which the lots in question were assessed is placed under those heads on parallel lines running from left

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to right of the roll opposite the names of the appellants and the description of the property, in Arabic numerals.

There is no mark or sign accompanying the figures indicating that they stand for dollars, other than the writing at the head of the perpendicular columns, as stated above.

We think those headings show that the figures stand for value of the property opposite which they are placed.

There is no decimal mark or sign separating the figures in any of the columns, except the one headed "total value;" and in that a line separates two figures from the left, leaving three on the right, showing that cents were not meant by those three figures, as two only are required for that purpose, and that dollars were certainly intended. Our tax laws require the property to be valued in dollars and cents, the terms commonly used in referring to money in this state.

If those figures do not mean value of the property, and in dollars likewise, what were they put there for? Our minds can conceive nothing else.

We are therefore of the opinion that the description and valuation are sufficient; but some mark representing dollars ought to be used in immediate connection with the figures to prevent trouble in the future.

The act of March 3, 1876, authorized the institution of the class of actions to which this belongs, and it was held to be constitutional, and construed in the case of *Spradling v. City of Louisville*, MS. Opin., 26 Nov., 1878. The plea of the statute of limitation was good as to the taxes of 1869, 1870, 1871.

Wherefore, the judgment is reversed upon the original appeal, and affirmed on the cross-appeal.

This opinion shall apply to the case of *Robert Ormsby et al. v. The City of Louisville*.

Campbell v. Bannister.

To a petition for a rehearing—

JUDGE HARGIS DELIVERED THE FOLLOWING RESPONSE:

The act establishing a board of commissioners of taxes and assessments for the city of Louisville, approved February 17th, 1866, has not been repealed, but was continued in force by an amendment of March 20th, 1876.

The only alteration made in the original act is the change of membership in the board.

Its provisions are necessary to secure correct assessments of property, and to protect the citizens against unjust, mistaken, or fraudulent assessments.

The city has the power under sections 8 and 107 of the act of March 3d, 1870, to *enforce* the observance of the Sabbath by penalties not less than that prescribed by the General Statutes; but it cannot abrogate the general law on the subject by refusing or neglecting to execute that power.

Some of the language of the opinion is modified. The petition and motion to extend the opinion is overruled.

CASE 37—ORDINARY—DECEMBER 16, 1880.

Campbell v. Bannister.

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133	396

APPEAL FROM MARION CIRCUIT COURT.

1. One whose house has been set on fire may, with proper precaution and without malice, tell his family his suspicions as to who did it, and, so doing, will not be liable to an action by a person wrongfully accused.
2. The fact that he repeated the accusation to others may be given in evidence to show that the communication to his family was malicious.
3. A new assignment re-states, in a more minute and circumstantial manner, the cause of action. It is in the nature of a new petition.

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4. Evidence of appellant's bad character was admissible, but only such witnesses as knew his reputation were competent. Evidence as to particular facts is not competent.
5. Appellee had the right to testify, and state that when he told his wife appellant burned his house, he told her not to speak of it.
6. Appellee is not restricted, in proof of bad character, to such persons as he had heard speak of appellant.
7. Appellee had no right to say to a juror "don't hang." It was an insult to the juror and a contempt of court.

RUSSELL & AVERITT AND THOMAS & FOGLE FOR APPELLANT.

1. The court erred in putting the burden of proof on the appellee.
2. It erred in letting in proof that did not point to general reputation.
3. The refusal of the court to permit proof that appellee had conveyed away and hid his estate since the suit, was erroneous.
4. The instructions for appellee are error.
5. Appellee's remark to the juror was ground for a new trial.

W. B. HARRISON FOR APPELLEE.

1. Several errors were committed, but all against appellee.
2. The pleadings are not sufficient to authorize a judgment against appellee.
3. The defense is affirmative, and appellee takes the burden of proof.
4. Confidential communications between persons as to a matter in which they are mutually interested are privileged. (Bac. Ab., title Slander, letter D, sec. 5; 2 Greenleaf's Ev., 384, 383; Grimes v. Coyle, 6 B. Mon.)
5. The court ought to have told the jury not to increase the damages on account of other words spoken of appellant. (Letton v. Young, 2 Met., 561.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

This was an action for slander in charging the plaintiff with the crime of arson. The defendant, by his answer, admitted that he spoke the words charged, but averred they were spoken to his wife in the privacy of his family, and were accidentally overheard by another person in the house, but not known to be within hearing, and thus, without having been so intended by him, became public. And he further averred that this was done without malice, and was the wrong and injury complained of in the petition.

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In his reply, the plaintiff averred that it was not true that the defendant spoke the words complained of under the circumstances stated in the answer; and he also averred that the defendant had often spoken the words, or the substance of them, in the presence of divers persons.

With the pleadings in this condition, the parties went to trial, which resulted in a verdict for the plaintiff for one cent in damages, and his motion for a new trial having been overruled, he has appealed.

One whose house has been set on fire may communicate to his family, under proper precautions, and without malice, his suspicions as to who the incendiary is, and he will not be responsible to a person falsely accused for so doing.

If he be sued, the fact that he repeated the accusation to others may be given in evidence, for the purpose of proving that the communication to his family was malicious, and that was the only purpose for which evidence of other publications of the defamatory words was admissible in this case.

The plaintiff, having traversed the allegations of the answer, had no right to recover for any other publication than that admitted in the answer.

If that was not the publication for which he sued, he should have filed an amended petition, setting forth his cause of action more minutely and circumstantially, and could not, by anything contained in his reply, draw the defendant away from the particular publication admitted in the answer. This could only be done by a new assignment.

A new assignment is not, properly speaking, a replication, since it does not profess to reply to anything contained in the defendant's answer, but throws aside as useless the previous pleading, or rather re-states, in a more minute and circumstantial manner, the cause of action alleged in the

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petition which the defendant, through mistake or design, has omitted to answer. It is, therefore, in the nature of a new petition, or rather it is a more precise and particular repetition of the matter contained in the original petition, so as to indicate that the plaintiff is suing for a matter other than that to which the answer relates. (Chitty on Pl., p. 653.)

Having failed to new assign and traverse the averment in the answer that the words were only published in the manner and under the circumstances stated in the answer, whether they were so published was the only issue to be tried. And on that issue the burden was on the defendant, and there was no error in permitting him to conclude the argument to the jury, and the only question that should have been submitted to the jury was, whether the words were spoken maliciously, there being no averment in the answer that they were true.

Much irrelevant and incompetent testimony was admitted, some of which was objected to, and some was not, and, without undertaking to state each item of such evidence, we will endeavor to lay down some general rules relating to each class of evidence deemed improper, or which, though objected to, is deemed competent.

Evidence of the general bad character of the plaintiff was admissible, but only such witnesses as were acquainted with his reputation among his neighbors were competent to speak of his general character, and evidence relating to particular facts or circumstances supposed to affect his general character, or tending to prove that he set fire to another house, or that he would have profited by the burning of the defendant's house, should not have been admitted. And while evidence of the publication of the same defamatory

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words at other times was admissible to prove malice in publishing the words in his family, the jury should have been told distinctly and clearly that it was admitted for that purpose alone, and that if they found for the plaintiff, they should not increase the damages on account of other publications. (Letton v. Young, 2 Met., 558.)

The defendant had a right to testify that when he told his wife that the plaintiff had set fire to the house that he also told her not to accuse any one, and not to tell her brother. Such evidence tended to rebut the evidence conducing to prove malice, and for the same reason he had a right to prove that after he learned that his wife's brother had overheard what he told her, he had "begged him to say nothing about it," and to testify that when he communicated his suspicions to his wife he believed what he told her was true. But as to this latter evidence, the jury should have been cautioned that it was admitted to rebut evidence of malice, and for no other purpose, and that it did not conduce to prove that the plaintiff was guilty of setting the house on fire.

Nor was the defendant restricted in giving evidence of the plaintiff's bad character to such witnesses as he had heard speak of the plaintiff's character before the alleged slander was spoken.

This objection proceeds upon a misapprehension of the purpose for which such evidence is admitted. The plaintiff's character, however bad, furnishes no excuse for speaking the words.

The only legitimate effect of such evidence is to reduce the damages. A person whose reputation is bad is, in con-

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temptation of the law as well as in fact, injured less by a slander than one whose reputation has previously been good.

Evidence of statements made by Turner, a witness for the plaintiff, was admitted over the plaintiff's objections. This was error. The only effect of the evidence admitted was to impair the credit of the witness by proof of statements made by him about which he was not asked, and which he had no opportunity to deny or explain.

One of the grounds assigned for a new trial was misconduct of the defendant in talking to a juror during the trial.

In support of this ground, an affidavit was filed, and not controverted, from which it appears that the defendant passed near one of the jurors during a recess of the court, and said in his hearing, "don't hang."

This was evidently intended to convey to the juror the wish of the defendant that the jury should not disagree, but find a verdict.

It was an insult to the juror, and a contempt of court, and a new trial should have been awarded on that, if there had been no other sufficient ground.

The rulings of the court upon questions relating to the admission and rejection of evidence, and in giving and refusing instructions, were not in conformity to the foregoing views, and the judgment is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

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CASE 38—EQUITY—DECEMBER 18, 1880.

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APPEAL FROM FLEMING CIRCUIT COURT.

1. If arbitrators act upon matters not submitted to them, and not within their authority, their action that far will be stricken out and disregarded; the residue will be enforced.
2. It is as true of hearings before arbitrators as of trials in court, that it is the duty of each party to present his whole case, as well as the proof to sustain it.
3. The ancient niceties and technicalities applied to arbitrations have given way to a more liberal and rational construction. This mode of ending litigation is to be encouraged.
4. A mere mistake as to the law on the part of arbitrators will not be sufficient to set aside their award.

W. H. CORD FOR APPELLANT.

1. There is no allegation of fraud or corruption against the arbitrators, and on this ground alone can the award be impeached. (53 Barb., 342; Parsons on Con., 215; 2 J. C. Rep., 551; *Ib.*, 339; *Ib.*, 101; 6 Pick., 148; 53 Barb., 342; 2 Story's Eq., 1454; 37 Howard, 20; *Ib.*, 88; 44 Vermont, 523; 2 Dutcher N. J. Rep., 130.)
2. A mistake of the arbitrators as to the law will not vitiate the award. (6 Vesey, 282; 2 Mad. Rep., 9; 1 Swanston, 55; 1 Vesey, 369; 9 *Ib.*, 365.)

ANDREWS & SUDDUTH FOR APPELLEE.

1. Appellant waived the award by his second amended petition. (*Carico v. Lilly*, 3 Mar., 398.)
2. The award is void, because the arbitrators acted upon matters not embraced in the reference to them. (2 Parsons on Contracts, 696; 13 Howard U. S., 26.)
3. The arbitrators made such mistakes of law and fact as to indicate gross ignorance or negligence. (2 Parsons on Con., 701; Ev. Jur., vol. 2, 1455; Waite's Actions and Defenses, vol. 6, 550; *Lashbrook v. Lee*, 9 Dana, 214; 3 Atkyns, 494; *Callant v. Downey*, 2 J. J. Mar., 348; *Burnam v. Burnam*, 6 Bush, 392.)
4. The award does not dispose of all matters referred to the arbitrators. (*Burnam v. Burnam*, 6 Bush, 392; 1 Dana, 351; 11 Wheat., 446; *Orear v. Singleton*, Sneed, 65; *Turpin v. Banton*, Hardin, 320; 5 Wheat., 394.)
5. The arbitrators and umpire acted together. (14 Johnson, 368; 14 B. Mon., 294; *Royse v. McCall*, 5 Bush, 696; 6 Dana, 93.)

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CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee for the settlement of a partnership in merchandising, which had existed between his intestate and the appellee, J. P. Ringo.

The sum of two thousand dollars was alleged to be due to the plaintiff; but the petition concluded with a prayer for a settlement of all matters pertaining to said partnership.

The parties agreed out of court to submit the entire controversy to the arbitrament of R. W. D. Hunt and W. S. Faut, and their umpire.

The arbitrators made an award, which concludes as follows: We do "hereby award that the said Joseph P. Ringo, surviving partner, pay to the said Charles Dougherty, as the administrator, &c., of said John Adams, the sum of nineteen hundred and eighty-seven dollars and twenty-seven cents, with interest at six per cent. per annum from the 6th of July, 1876; and as to the uncollected notes of \$390.97, and lot of accounts of \$807.21, making of them \$1,198.18, we hereby also award that they be equally divided between plaintiff, who is to have half thereof, and the defendant one half, and to be so divided, having regard to solvency and value, all probabilities considered. Given under our hands the 6th of July, 1876.

[Signed]

"WM. S. FAUT,

"R. W. D. HUNT,

"*Arbitrators.*

"As the umpire, and fully acting therein, I hereby concur in said award.

[Signed]

WM. GRANNIS."

Appellee having refused to perform the award, appellant filed an amended petition, setting it up, and praying for the money awarded.

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The appellee answered, setting up grounds for vacating the award, viz :

1. That the arbitrators and umpire acted together in deciding all questions that arose before the arbitrators, whereas he should only have acted when there was a disagreement between them.

2. That the arbitrators took into account, and settled and reported upon matters not submitted and not brought into controversy by the petition.

3. That they did not settle all matters growing out of said partnership which were unsettled.

4. That the decision of the arbitrators "is palpably erroneous and unjust *in re minime dubia*."

The case was referred to the master, who took proof, and reported a small balance in favor of the appellee. The court confirmed the report, and rendered judgment pursuant thereto, from which this appeal is prosecuted.

1. The evidence fails to sustain the first objection. It does not show that the umpire acted in the decision of any questions, except such as the arbitrators differed about, and this was the duty of his office. It is shown that he sometimes took part in the discussions of questions that came up, and that he made out the statement of the accounts by means of which the ultimate conclusion was reached. But it does not appear that the part he took in discussions was of such a character as was calculated to influence the decision of the arbitrators. All that appears is, that he sometimes took part in their discussions. He made up the account at the request of the arbitrators, and under their supervision, and they approved his work when done. The accounts seem to have been simple, and the arbitrators were no doubt selected more on account of their good sense and

sound judgment than their skill in the mere clerical work of putting down the items of debits and credits, and summing up the result ; and the fact that they employed their chosen umpire, who no doubt stood impartial between the parties, to do that work, furnishes no ground for setting aside the award.

2. The facts relied upon to sustain the second objection are, that the arbitrators charged the appellee with the whole of the salary and board of the only clerk employed by the firm. This, it is claimed, was not involved in the suit, and therefore was not submitted to the arbitrators. We cannot concur with the appellee in this. Whatever claim either asserted against the other as growing out of the partnership, whether well or ill-founded, was a matter in controversy in the suit, and embraced in the submission, although not mentioned in the petition.

3. It is claimed that because the arbitrators did not divide the notes and accounts found to remain uncollected, and because there are uncollected notes and accounts not reported by them, they did not settle all the questions submitted to their decision.

To ascertain how much the appellee had collected on notes and accounts outstanding at the death of Adams was one of the matters submitted. The balance could not be struck between the partners without ascertaining the amount of such collections. This we must presume was done.

The award directs how the \$1,198.18 of notes and accounts found to be uncollected shall be disposed of between the partners, but it neither disposes of them by division, nor identifies them so that they may be distinguished from other notes and accounts shown by the pleadings filed and proof taken since the award to be also uncollected.

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It is therefore clear that if it was the duty of the arbitrators to dispose of the uncollected notes and accounts between the partners, they have failed to dispose of all matters submitted to them, and their award was properly set aside. But we are of the opinion that the arbitrators had nothing to do with the uncollected assets. The object of the suit was to procure a settlement of all controversy growing out of the partnership. When an asset was collected, its proceeds passed into the hands of the surviving partner, and in order to ascertain the state of the accounts between the partners, it was necessary to ascertain how much he had collected. The amount of such collections was therefore a matter in controversy, to be decided by the arbitrators under the submission of "all matters involved in said suit." But the surviving partner was not chargeable with, or liable for, uncollected assets, and no effort was made in the petition or the award to charge him with them. They were, therefore, not matters in controversy, and not within the scope of the submission. If it be said that, these matters not being within the scope of the submission, the arbitrators transcended their authority, and therefore the award must be set aside, we answer that this part of it may be stricken out or disregarded, and the residue may be upheld and enforced. (Williams v. Davis, 2 J. J. Mar., 539.)

4. In order to show that the award is erroneous and unjust, the appellee alleges that numerous items of debits and credits made and given by the arbitrators are improper. These will be considered *seriatim*.

He alleges that Adams gave himself credit on the firm books for \$364 to which he was not entitled, and that the books also show that Adams paid a debt of \$251.56, which another firm of which he was a member, owed to John A.

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Dougherty, by giving Dougherty credit for that sum upon the books of the firm of Adams & Ringo.

The fact that these matters were entered on the firm books during the continuance of the partnership was, after the death of one of the partners, sufficient evidence to warrant the arbitrators in treating them as correct, and especially so, unless evidence was produced before them to show that these credits were incorrect, which does not appear to have been done.

It is next alleged that the arbitrators charged him with \$311.88 as collected from John A. Dougherty, although there was before them plain evidence that Dougherty denies that he owes any such balance, and is suing him (appellee) as surviving partner for a large sum claimed against the firm.

It is not alleged that this sum was not in fact collected from Dougherty, and this is a sufficient answer to this allegation.

It is also alleged, that although he (appellee) shows uncollected debts due to the firm amounting to \$2,410.74, the arbitrators only deducted from the gross assets \$1,198.18. Although it is not anywhere alleged that the arbitrators charged him with more than he collected, this allegation may have been intended to so charge, and we will treat it in that light.

The arbitrators were to act upon the evidence before them, and it was the duty of each party, unless prevented by casualty or misfortune, or the action of the arbitrators, to bring before them all his evidence touching the several matters to be decided by them. The appellee does not say he produced uncollected debts to the amount of \$2,410.74 to the arbitrators, or that there was not sufficient evidence

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before them to authorize them to decide that he had actually collected the amount with which he was charged. All he says is, that he shows (*i. e.*, by his answer) that there are uncollected debts amounting to \$2,410.76, instead of \$1,198.18, the amount reported by the arbitrators.

It is further alleged that Mrs. Adams, who was the original administrator of the deceased partner, collected \$857.59 due the firm, with which the arbitrators did not charge her in making up their award. But it is not alleged that knowledge or proof of this fact was brought before the arbitrators. Moreover, it appears from the evidence now in the record that the firm held a debt against two sisters of Mrs. Adams, and that the appellee collected as much on one of them as Mrs. Adams collected on the other; and it does not appear, by either allegation or proof, whether the amount collected by the appellee was charged to him. But if we assume that it was, the result must be the same. Mrs. Adams denies that she made any such collection, and while the evidence before the master shows that she did, she testifies that she did not, and there is nothing to show that on the evidence before the arbitrators they were not fully justified in deciding as they did.

It is complained that the arbitrators charged the appellee with interest for several years on sums charged to him, and failed to allow him interest on money paid out by him in discharge of firm debts.

It does not appear that he was charged with interest on anything more than the balance found in his hands; and as he must be presumed to have paid those debts out of money belonging to the firm, it does not appear that any injustice was done in charging him with interest.

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He also complains that the arbitrators failed to allow him credit for all the firm debts paid by him, and that they failed to allow credit for \$1,500 paid in by him as capital stock; but neither alleges nor proves that he offered any evidence of the correctness of either of these claims.

These were all matters clearly within the scope of the submission, and there is no pretense that he did not have a full and fair hearing and opportunity to present every item now presented, and to offer whatever evidence he had to support them; and it is as true of hearings before arbitrators as of trials in court, that it is the duty of each party to bring forward his whole case and the proofs to sustain it. Any other rule would render arbitrations worse than useless, and open a door by which the defeated party would generally be able to escape from the award by withholding a part of his case, and setting it up to show that the award was erroneous and unjust. Conceding for the present that a mere mistake of law or fact may authorize the chancellor to set an award aside, the question whether there was mistake or not must be determined from a view of the case as presented to the arbitrators, and not as it may appear upon a different presentation and different proofs in the suit to set it aside.

Tested by this principle, none of the items above adverted to under this head would authorize the interference of the court to set aside the award. It does not appear as to any one of them that the action of the arbitrators was even erroneous, if tested by the case as presented to them.

But as to two items, the record shows that the arbitrators made a mistake of law in deciding the case as it was presented.

The firm employed but one clerk, and he seems to have been boarded by Adams and paid by the firm.

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It appeared that Adams had given all his time to the business of the firm, and that the appellee had given but little attention to its business. There was no evidence of a contract between the partners that appellee should pay either the board or hire of the clerk. In the absence of such evidence, the hire of the clerk should have been paid by the firm. (*Lee v. Lashbrook*, 8 Dana, 214.)

Should the award have been set aside for this mistake?

Some elementary authorities, and two cases decided by this court, *Callant v. Downey*, 2 J. J. Mar., 348, and *Burnam v. Burnam*, 6 Bush, 392, and one English case, *Ridout v. Pain*, 3 Atkyns, 494, are cited to establish the proposition that an award may be set aside for mistake of law by the arbitrators.

The case in *Atkyns* was decided during the last century.

"The mode of settling controversies by arbitration has in modern times become a peculiar favorite of the law, and the ancient niceties and technicalities applied to it have given way to a more rational and liberal construction, with a view to encourage and sustain this mode of putting an end to litigation. Hence it is that many of the more ancient adjudications upon the subject are found not to be good authority." (*Strockey v. Glassford*, 6 Dana, 11.)

In *Callant v. Downey* this court incidentally, in the course of its opinion, says that an arbitration cannot be revised except it be shown that the arbitrators were guilty of fraud, or made a palpable mistake in the law or facts. But there was no discussion of the principle involved, and what the court said seems rather to have been intended as a concession to the party seeking relief, made with a view to show the utter absence of equity in his bill, than as the announcement of a recognized rule of law.

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In *Burnam v. Burnam* the award was set aside because the time limited by the order of court had expired before the award was made.

Having set aside the award on that ground alone, and thus opened every question in the cause, the court said:

"Another objection to it (the award) may be noticed, as it may avoid further difficulty," and then proceeded to point out the mistake made by the arbitrators; but the award was not set aside because of the mistake, nor did the court decide that the award would have been set aside on that ground alone. What the court said on this point was intended for the guidance of the court below in the further progress of the case, and not as a reason for setting aside the award.

The statute of 1798 provided that no award should ever be set aside, unless it should be made to appear that such award was obtained by corruption, evident partiality, or other undue means.

The decisions in *Baker v. Crockett*, Hardin, 388; *Ewing v. Beauchamp*, 2 Bibb, 456; *Lillard v. Casey*, Ib., 459; *Wigglesworth v. Mortoh*, Ib., 160; and *Ewing v. Beauchamp*, 3 Bibb, 44, were all made while that statute was in force. The provision above referred to of the act of 1798 was omitted from the Revised Statutes, the corresponding section only providing that "no award shall be set aside for want of form, but courts of chancery shall have power over awards as heretofore;" and this section is continued in force in the General Statutes. (Sec. 6, ch. 4.)

It might be plausibly contended that the phrase "courts of chancery shall have power over awards as *heretofore*," was intended to restrict them as they had been restricted by the act of 1798. But waiving this, we think it clear that only such powers as courts of chancery might have exercised

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independently of the act of 1798 can now be exercised by such courts without a violation of the statute.

In *Baker v. Crockett* it appeared on the face of the award that the arbitrators had made a mistake of law, and this, too, when the law relating to the very subject about which the arbitrators had been called to act had but recently been passed upon by this court.

In that case the court said:

"We are therefore of opinion that either, as at the common law or in equity, with or without the statute, this award cannot be set aside for *mistake* of law apparent in the body or face of the award."

In *Ewing v. Beauchamp*, 3 Bibb, 45, the court quoted and approved the language just quoted from the opinion in *Baker v. Crockett*.

Although these cases were decided while the statute was in force, the quotation *supra*, and much more that was said, applies as well now as it did then.

In *Ewing v. Beauchamp*, 2 Bibb, the court said: "The very object of submitting a cause to arbitration ought to prevent too easy an ear by the courts to upset awards. It is a mode of decision preferred by the parties, in which, from its nature, they agree to risk the event of the decision on the judgments and integrity of men of their own choosing." And again: "It would at once prostrate this mode of trial, by the consequent subjection to a suit in chancery, and instead of a *cheap* and *speedy* administration of justice, would produce precisely the reverse.

These authorities warrant us in holding that if arbitration is to continue to be one of the modes of settling litigation, a mere mistake of law, such as that made by the arbitrators in this case, furnishes no sufficient ground for setting aside

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an award. We will not say that the decision of arbitrators might not be so in conflict with a plain principle of law which, from its nature, must be supposed to be well understood by all intelligent laymen as to furnish evidence of partiality and corruption. But in that case we would set aside the award for corruption proved by the decision, and not because there was an honest mistake.

If arbitrators should decide that the children of a deceased person, admitted to have been born in lawful wedlock, were not his heirs, we should not hesitate to set aside their award. All reasonably intelligent men know that such is the law, and a decision that such children were not the heirs of the deceased parent would be satisfactory evidence of corruption.

But when arbitrators decide that if one partner gives his whole time to the business of the firm, and the other gives it none, or only a small part of his time, the latter shall pay the hire of a clerk, so as to make up for the loss of his own services, and thus equalize the partners, it would be going a great way to say that such decision furnishes evidence of partiality or corruption.

Mere mistakes of computation may no doubt be corrected, but mistakes in matters of judgment, whether upon questions of law or fact, which do not prove partiality or corruption, cannot be corrected.

Tested by these principles, there is no sufficient ground for setting aside the award; and the judgment is reversed, and cause remanded for judgment for the amount found by the arbitrators.

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To a petition for rehearing—

CHIEF JUSTICE COFER DELIVERED THE FOLLOWING RESPONSE:

In his second amended petition the appellee said, "that if his said award is not and cannot be enforced herein (as) demanded, then he claims the right to, and does, amend, state, and aver that said defendant was indebted to the estate of John Adams in the further sum of \$3,954," &c.

This was not a waiver of the award. The claim to set up and recover the larger amount claimed to be due was expressly made to depend upon his inability to enforce the award.

Nor was there any waiver in failing to object to a reference to the master, or in appearing before him without objection.

That the hire of Sanders was paid by the firm and entered on the firm books was not a settlement between the partners as to whether the appellee should pay his hire as an offset to the personal services of Adams for the firm.

The petition must be overruled.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The word "child" does not ordinarily embrace grandchild, but should be so construed where the manifest intention of the maker of the instrument would otherwise be defeated or the instrument rendered inoperative, or where other words show that the word was used in a more extended sense than that in which it is ordinarily used.
2. As used in section 11 of the charter of the Kentucky Masonic Insurance Company, which provides that, upon the death of a member intestate without widow or *child*, the fund created by the charter shall vest in the company, the word "child" embraces grandchild, as to hold otherwise would be to defeat the manifest intention of the members of the company.
3. Under the charter, the personal representative of a deceased member can never take any interest in the fund arising from the membership of the decedent.
4. The company and one of its members cannot, by any stipulation in the certificate of membership, defeat the rights of those whom the charter declares to be beneficiaries.
5. The charter gives the member a mere power of appointment in case he has neither wife or child, and, having no personal interest in the fund, it does not pass under a will disposing of all his estate, unless specifically mentioned.
6. A life policy for the benefit of the family of the person procuring it is in the nature of a will, and, as far as possible, should be so construed.

HARLAN & WILSON FOR APPELLANT.

1. The executor is not entitled to the fund. The charter of the company provides who shall be the beneficiaries of the fund upon the death of a member, and their rights cannot be affected by any action of the member, or the company, or both. (Ky. M. M. Life Ins. Co. v. Miller, 13 Bush, 489.)
2. An insurance policy is in the nature of a devise, and is governed somewhat by the same rules.
3. The surviving issue of a devisee who died before the testator, takes as the devisee or legatee would have done had he survived. (Campbell v. Rawdon, 18 N. Y., 412; Carson v. Carson, 1 Met., 302; Gen. Stat., pp. 512 and 826.)
4. Even where the testator has the right to dispose of this fund by will, it does not pass under a general devise of all his estate, but must be specifically mentioned.

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5. The appellant is a child of the deceased member within the meaning of the company's charter.

LANE & HARRISON FOR APPELLANT.

1. The insured has no personal interest in the policy, and cannot transfer to any other person the interest of the person or persons named in the policy as the beneficiaries. (Bliss on Life Insurance, secs. 317 and 339.)
2. The power conferred on the insured to dispose of the fund in controversy by will was not executed, as the fund is not mentioned in the testator's will. (Gen. Stat., page 833; 4 Kent, 327; Brodish v. Gibbs, 3 Johnson's Ch'y, 551; Blodge v. Mills, 1 Story.)
3. As a policy of insurance is in the nature of a testamentary provision, and is governed by the same rule of construction, the word "child" used in section 11 of the company's charter, must be construed to embrace grandchild. (Conn. Mut. Life Ins. Co. v. Palmer, 42 Conn., 60; Ewing's heirs v. Handly, 4 Litt., 349; Marsh v. Hagan, 1 Edw. Rep., 174; sec. 1, art. 2, chap. 50, Gen. Stat.)

ELLIOTT & ATCHISON FOR APPELLEE.

1. The word "child" used in the company's charter cannot be construed to mean grandchild, and as the insured had neither wife or child, he had the right to dispose of this fund by will, which he has done. (Churchill v. Churchill, 2 Met., 469; Roper on Legacies, vol. 1, page 69; 2 Jarman on Wills, 51, 52; Phillips v. Beall, 9 Dana, 2; Yeates v. Gill, 9 B. Mon., 204; Hughes v. Hughes, 12 B. Mon., 121.)
2. The mother of the appellant dying before the insured, her interest in the policy lapsed, and her son took no interest in it. (Gore v. Stevens, &c., 1 Dana, 205-6.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

B. F. Crowfoot, at the time of his death, had a certificate of membership in the Kentucky Maçonic Insurance Company.

At the time he procured the certificate he was a widower, and had only two living children, Lou May and Anna. Lou May died in the life-time of her father, unmarried, and without issue. Anna married and died, also during the life of her father, leaving the appellant, W. T. Duvall, her only child, surviving.

During the life of Anna, B. F. Crowfoot made his last will and testament, in the third clause of which he devised

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his residuary estate to his executor in trust to be invested, and to pay the income to Mrs. Duvall during her life, and after her death to be disposed of as directed by the will; but no mention is made therein of the fund to arise from his membership in the insurance company. After the death of Crowfoot his executor and the guardian of the appellant both claimed the money due on account of his membership, and the company filed its petition of interpleader, and paid the money into court. On final hearing, the chancellor adjudged the fund to the executor.

From that judgment this appeal is prosecuted.

Section 10 of the charter of the company provides the manner in which a fund shall be raised which shall "be paid for the benefit of the widow and children" of deceased members, and section 11 reads as follows:

"The fund created in section 9 (section 10 was evidently intended) for the benefit of the widow and children of the deceased member shall be paid to them by said company as soon as it can be collected, or to their trustee, in the discretion of the company, subject, however, to be appropriated for their benefit equally, according to (the) will of (the) deceased member; or if he should leave no widow or child, then to be appropriated according to his will, or if he makes no will, and leaves no widow or child, it shall vest and remain in the company and be added to its capital stock, or be appropriated as they (it) may deem expedient."

Crowfoot left no widow and no child, according to the ordinary definition of the word child, and it is claimed that the contingency therefore existed in which, under the charter, he had power to dispose of the proceeds of his membership by will, and that he has done so by the clause disposing of his residuary estate.

The word child does not ordinarily embrace grandchild. (Churchill v. Churchill, 2 Met., 469; Hughes v. Hughes, 12 B. Mon., 121.)

This question has generally arisen in the construction of wills, and these cases show that there are two classes of cases which constitute exceptions to the general rule, viz :

First. When the will or writing would otherwise be inoperative, or manifest intention would be defeated.

Second. When the will or writing shows by other words that the word was not used in its ordinary and proper sense, but in a more extended sense.

This case clearly does not fall within the second exception. Does it fall within the first?

If we hold that it does not, then when a member dies intestate, and without wife or child, the proceeds of his membership is forfeited to the company, even though he may leave lineal descendants surviving. No construction should be adopted which would lead to such consequences if it can be avoided. We are not to construe the charter alone with reference to the rights of the parties interested here. Thousands not parties are as much concerned in the construction to be given to it as are these immediate parties, and as a construction upon the point involved here will bind this court and all future litigants whose rights may involve the same point, it is our duty to look beyond this case, and so to construe the language as to effectuate the intention of all those who are or may become members, and to prevent injustice to the descendants of members who may die intestate without having either wife or child surviving.

No argument is needed to prove that neither the legislature, nor those who become members of the company, intended or intend, in case of the death of a member leaving

grandchildren but no child or children, that the proceeds of his membership should be forfeited to the company. Nor does the company so construe the charter or ask the courts to so construe it, as is shown by the fact that it does not claim the fund involved in this case.

A life policy for the benefit of the family of the person procuring, though not a testament, is in the nature of a testament, and in construing it the courts should treat it, as far as possible, as a will, as in so doing they will more nearly approximate the intention of the persons the destination of whose bounty is involved in such cases. As said in a former case, it is not to be supposed that a father, in procuring insurance on his own life for the benefit of his family, or in keeping such a policy alive, intends to benefit himself or his estate, and especially is that true when, by the terms of the charter of the company in which he insures, with which he must be presumed to be familiar, he cannot take insurance for the benefit of any one except his wife or children, if he have either, and cannot dispose of the insurance if he leaves either wife or child surviving.

It is manifest from the charter that a member of the company has no personal interest in his membership, and that his personal representative as such can never take any interest in it after his death. This is shown by the provision that if the member dies without leaving wife or child, and without having made a will, it shall vest in the company. If it had been intended that the personal representative, as such, should have the fund, that clause would have been omitted altogether.

And that the personal representative takes no interest, is further shown by the express declaration that the proceeds of membership shall in no event be liable for the debts of a

member, which could not be avoided if the personal representative were entitled to the fund.

We therefore conclude that the charter gives the member a mere power of appointment in case he has neither wife or child, and that he has no interest whatever in the fund, and, therefore, that it did not pass under a will merely disposing of all *his* estate, but in which no mention is made of the fund to arise from his membership. (4 Kent, 327.)

We have not overlooked the stipulation in the certificate of membership "to pay to said Crowfoot's daughters, Anna and Lou May Crowfoot, or his assigns, or as he may direct by will," &c.

We decided in the case of this Company v. Miller's adm'r (13 Bush, 494), that "it is not in the power of the company, or of the member, or of both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent therein indicated." And we held in that case, that even if Miller and the Company had intended by the stipulation in his certificate to make the proceeds of his membership payable to his administrators or creditors, such stipulation could not have defeated the rights of those whom the charter declares to be beneficiaries.

The judgment must therefore be reversed, and cause remanded with directions to render judgment in conformity to this opinion.

DECISIONS
OF THE
COURT OF APPEALS OF KENTUCKY.

JANUARY TERM, 1881.

CASE 40—EQUITY—FEBRUARY 10, 1881.

Pope, &c., v. Shanklin.

APPEAL FROM BULLITT CIRCUIT COURT.

1. A covenant between husband and wife, that, in consideration of his receiving a sum of money devised to her by her father, he would secure the money to her separate use, and, if she died childless, it should go to her heirs, cannot be enforced after her death.
2. A contract between husband and wife for the benefit of third persons, to whom the husband is under no legal or moral obligation, is void.
3. The husband takes the personalty by survivorship.

LEWIS & FARLEIGH FOR APPELLANTS.

1. The contract and mortgage created in the wife a separate estate in the fund. (Bryant's adm'r v. Bryant, 3 Bush, 155; Campbell v. Galbreath, 12 *Ib.*, 459.)
2. The husband became the trustee for appellants, who are the brothers and sisters of Mrs. Shanklin.
3. The petition exhibits a complete cause of action.

F. P. STRAUS FOR APPELLEE.

1. The contract between husband and wife, although a court of equity would uphold it to the extent that the wife derived benefit from it, is void as to appellants. (Wilson v. Daniel, 13 B. Mon., 350; Cox v. Coleman, *Ib.*, 452.)
2. As husband, appellee, having survived the wife, is distributee.

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The claim of the appellants rests upon the alleged agreement between the appellee and his wife, which is certainly

without any consideration, good or valuable, moving from them, and it is doubtful, from the statements in the petition, whether there was any other than a good consideration as between the husband and wife. If the agreement was made before the husband had reduced the wife's estate to possession, it is supported by a valuable consideration. (*McCauley v. Rodes*, 7 B. Mon., 462; *Patridge v. Havens*, 10 Paige, 618.) But if made afterward, it would be supported by a good consideration merely.

But if we assume that the money of the wife had not been reduced to possession, and that the husband agreed with her that, in consideration of her receiving it, he would secure four thousand dollars to her separate use, and that if she died childless, it should pass to her heirs, we encounter the question whether a contract between husband and wife for the benefit of third persons, to whom the husband is otherwise under no legal or moral obligation, can be enforced against him by such third persons.

At law, all contracts between husband and wife are void; but such contracts, when advantageous to the wife, will be upheld in equity for her benefit and protection. We are not aware, however, that such a contract has ever been enforced against the husband for the benefit of third persons for whom neither husband or wife was under any legal or moral obligation to provide.

That the husband, after the execution of the mortgage, may have held the fund as trustee for his wife, does not aid the appellants. The law made him trustee from necessity, and for a specific purpose, *i. e.*, to uphold the transaction for the benefit of his wife, and for no other purpose; and when she died, the fund was in his hands for whoever was legally entitled to it. (*Thomas v. Harkness*, 13 Bush, 23.)

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Unless the promise made to his wife for the benefit of the appellants is enforceable, the fund belongs to him as survivor, and we are unable to discover any legal or equitable ground upon which he can be held upon an otherwise unenforceable agreement, because he was a trustee for his wife.

Judgment affirmed.

2r	232
4r	384
79	232
90	34

79	232
1108	777

79	232
136	626

CASE 41—ORDINARY—FEBRUARY 12, 1881.

Pryor v. Mizner, &c.

APPEAL FROM JESSAMINE CIRCUIT COURT.

One who is nominated executor of a will has such an interest as gives him the right to appeal from the judgment of a county court rejecting the will.

GEO. R. PRYOR FOR APPELLANT.

Appellant, who is appointed executor of the decedent's will, clearly has the right of appeal from the county court of Jessamine county, which rejected the paper. This right has frequently been asserted in this court. (*Payne's Will*, 4 Mon., 424; *Thompson v. Blackwell*, 17 B. Mon., 610; *McDonald's Will*, 2 J. J. Mar., 332; *Wells' Will*, 5 Litt., 273; 4 Mon., 153; *Tibbatts v. Berry*, 10 B. Mon., 473; *Redfield on Wills*, 3d vol., 77; *Ib.*, 123; *Gilbert v. Bartlett*, 9 Bush, 52; 33 Ind., 339.)

PORTER & WALLACE FOR APPELLANT.

There can be no question that appellant had the right to present the will for probate. Having that right, with his interest as executor we insist that his right of appeal is clear. (*Gordon v. Woods*, 4 Bibb, 477; *Aleck v. Tevis*, 4 Dana, 242; *Mitchell v. Rea*, 6 J. J. M., 625; *Rev. Stat.*, vol. 1, 497; *Gilbert v. Bartlett*, 9 Bush, 52; *Gen. Stat.*, 838; 3 Met., 268; *Ingles v. Hume*, 3 B. Mon., 33.)

JNO. S. BRONAUGH FOR APPELLEES.

1. Appellant is not a devisee, but only appointed executor in the paper purporting to be decedent's will.
2. He has no right to an appeal. (*Gen. Stat.*, chap. 113, sec. 27; *Civil Code*, sec. 700.)

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HUSTON & MULLIGAN AND BRECKINRIDGE & SHELBY FOR APPELLEES.

1. The paper, on its face, shows that two persons are nominated executors. There is no evidence that either is dead, nor that any one, other than Pryor, has ever refused to undertake the execution of the will.
2. Appellant has no such interest as will authorize his appeal.
3. This court has no jurisdiction over the judgment of the circuit court dismissing the appeal from the county court. (Gen. Stat., chap. 113, sec. 7; Civil Code, sec. 700; *Ib.*, 724; Hilliard on Ex'rs, 150; *Ib.*, 231; M. & Brown, vol. 1, 660; Gen. Stat., 440; Rev. Stat., vol. 1, 497.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the circuit court dismissing an appeal taken by one nominated as executor by the will of John Mizner from an order of the Jessamine county court, rejecting that paper as his last will.

It is urged in argument here that one named as executor has no such interest as enables him to prosecute an appeal from such an order. By the rule of the common law, the person named as executor derived his powers to act as such from the appointment by the devisor; but now the right to discharge the duties of an executor is derived from the probate of the will.

Under the General Statutes, "the person named as executor shall not act as such to *any extent* until the will or an authenticated copy of it is admitted to record, and he has executed bond, and taken the oath required by law in the court in which the record is made; but he may provide for the burial of the testator, pay the reasonable funeral expenses, and take care of and preserve the estate." (Art. 1, sec. 1, of chap. 39.) So his power is not only limited by the statute, but his acts in taking care of the estate and providing for the burial of the testator seem not to attach to him as executor, as, in the language of the statute, "he shall not act

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as such to any extent until the will is admitted to probate, and his qualification according to law." It is made the duty of the executor to execute the will of the testator, and it is also incumbent upon him to present the will to the county court of the testator's residence for probate; and while he cannot act as executor until his qualification as such, it is difficult to perceive how he can qualify until the paper is adjudged to be the last will of the deviser; and having presented the paper to the proper tribunal for probate, it would be a dereliction of duty on the part of the executor, if he was satisfied that the paper was the last will of the testator, to permit its probate denied without any additional effort to have the will recorded.

It is true the judgment of the county court would ordinarily protect the executor; but as the duty of executing the will has been confided to him by the deviser, good faith requires that he should exhaust the remedy afforded him by law for having the will probated, if he is satisfied it was improperly rejected by the county court. Many of the devises in that paper are made to non-residents, and a fund is set apart, to be controlled by the executor, for the purpose, to use the language of the will, "to stimulate emulation among the students of Bethel Academy, I hereby direct my executor to set apart the sum of five hundred dollars, to be used as a prize fund. They shall loan or invest the same as in their judgment they may think best," and with the income three prizes shall be procured and competed for by the students of that academy. A like devise is made for the benefit of the students of the Jessamine Female Institute.

All these trusts and duties with reference to the estate of the deviser have been confided to the executors named in:

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the rejected paper, and it is not only their right but duty, if in good faith they, or either of them, are satisfied that the paper has been improperly rejected, to prosecute an appeal to the circuit court. The trusts and duties required of them vest them with such an interest as enables them to prosecute the appeal. Such appeals have been often prosecuted to this court by like fiduciaries, and while the question has never been raised, the past practice and precedents should be regarded as authoritative on the question. (Wells' will, 5 Littell, 273; Tibbatts v. Berry, 10 B. Mon., 473.)

The mode of taking the appeal has been determined by this court in the case of Jones v. Jones, 3 Metcalfe, 268. Filing a transcript of the proceedings in the county court with the clerk of the circuit court, and having summons issued, is all that is required. No supersedeas or bond for costs is required either in the circuit court or this court, and the executor having brought all the parties in interest before the circuit court, and presented a transcript of the record from the county court, has done everything necessary to enable him to be heard in that court. The statute in regard to wills and appeals in such cases fails to designate any particular mode or form for prosecuting the appeal, and therefore the mode adopted by or practice sanctioned for many years will not now be disregarded. Appeals are taken in such cases to the circuit court as appeals are taken to this court, by filing a transcript of the proceedings and having summons issued.

No bill of exceptions is necessary in this case. The record of the circuit court shows that the transcript was filed in that court, and that on motion the appeal of the executor was dismissed. The dismissal was improper, and the order of the circuit court is reversed, with directions to hear the

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appeal. (Payne's will, 4 Mon., 422; Thompson v. Blackwell, 17 B. Mon., 610; Jones v. Jones, 3 Met., 266; McDaniel's Will, 2 J. J. M., 331; Wells' Will, 5 Littell, 273; Gilbert v. Bartlett, 9 Bush, 49.)

CASE 42—EQUITY—FEBRUARY 12, 1881.

Gossom, &c., v. McFerran.

APPEAL FROM BARREN CIRCUIT COURT.

1. Section 491 of the Civil Code, in so far as it authorizes the sale of real estate upon the petition of the life-tenant in opposition to the wishes of the owner of the fee, where the latter is not laboring under the disability of infancy or of unsound mind, is unconstitutional.
2. So long as the citizen is under no legal disability to act for himself in the management of his property, he is protected by the constitution from interference on the part of the state.

R. RODES FOR APPELLANT.

Section 491 of the Civil Code, in so far as it authorizes a sale of the interest of an adult remainderman at the instance of the life-tenant, is unconstitutional, as it operates to deprive a citizen of his property without his consent. (Constitution U. S., art. 5, sec. 1; *Ibid*, art. 14, sec. 1; Constitution Ky., art. 13, secs. 2 and 14; 20 Wallace U. S. Rep., 655-6; 12 Bush, 22; 3 Washburn on Real Property, sec. 2, title Grant, side-pages 538-541; Cooley's Constitutional Limitations, p. 442, side-pages 357 and 531-533; 4 Kent's Com., side-page 331; Potter's Dwarria, 487-489; 8 Bush, 459 and 597.)

LEWIS & PORTER FOR APPELLEE.

1. The sale was properly decreed, as the proof shows that both parties will be benefited thereby.
2. Such sales have been too long sanctioned to now question the constitutionality of the section of the Code authorizing the sale in this case.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Mrs. Alexander having dower interest in a house and lot in Glasgow, sold and conveyed her interest to C. L. Hill,

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who sold it to appellee. After the sale by Mrs. Alexander, the house was destroyed by fire, and appellee being unable to rent the lot in its unimproved state, instituted this action against appellants, who are the owners in fee of the remainder, seeking a sale and reinvestment under the direction of the court. Appellants objected to a sale of their interest in the land, and from a decree directing a sale and reinvestment they appeal.

The only question we will consider is, whether section 491 of the Civil Code, in so far as it authorizes the sale of the property of an adult, not under the disability of infancy, and not of unsound mind, is unconstitutional.

After a careful consideration and full investigation, we have concluded that the section referred to, and to the extent indicated, is unconstitutional. It operates in effect to take the property of one individual and transfer it to another, when neither is under such disability as to require the guardianship of the courts.

Where any of the citizens are incapacitated to act for themselves, it becomes the duty of the state to protect their interests, and it is upon this idea and for this reason that jurisdiction has been conferred upon the courts to sell and reinvest the proceeds of property belonging to such persons when in the judgment of the court it is to their interest. The court acts and consents for them because they cannot act or consent for themselves. But so long as the citizen is under no legal disability to act for himself in the management of his property he is protected by the constitution from interference on the part of the state, whether that interference comes directly by legislative act, operating immediately upon the property, or intermediately through the courts. There may be cases of tenancy in common, or

even of joint tenancy, where the courts can be authorized to sell the property so held, and one of the joint tenants or tenants in common, who is *sui juris*, refuses, without reason, to sell. But even in that case there would be no power in the court by any legislative enactment to reinvest the proceeds of the property of the recalcitrant tenant. Such cases, as said by Chief Justice Lewis in Kneass's Appeal, 31 Pa. St., are placed on the ground "of the necessities of justice." In all such cases, where sales have been sanctioned, there was a joint ownership in fee, and a joint right of possession—conditions not existing in this case. In addition to these cases, it has been held that when the interest is not vested but contingent, a sale might be had without the consent of the contingent remainderman.

In the case under consideration the party seeking to have the fee disposed of against the will of the owner has only a qualified or limited interest that may be terminated at any moment. She has in no way been interfered with by appellants in the enjoyment of what estate she has in the property; and if the property is not so productive to her by reason of the burning of the house, it is her misfortune, which operates with detriment to appellants as well as to appellee, and that without any fault of appellants.

To hold that a life-tenant, when it may appear to be to his or her interest, may go into a court of equity, and in opposition to the wish of the remainderman, have the fee sold and the proceeds reinvested, would operate to destroy estates in remainder. It will not do to say that the court first determines that it will be to the interest of the remainderman before a sale will be authorized. The court has no right to appoint a guardian for one who is *sui juris*, nor to consent for or to act for him. So long as the person is not

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disabled to manage the property, his or her judgment must determine the question as to whether a sale would be to his or her interest, unless in the case of tenancy in common and joint tenancy heretofore mentioned.

It does not matter that in this case Mrs. Gossom, in whom is the fee, is a *feme covert*. She is under no disability that prevents her disposition of her property in any way that may suit the pleasure of herself and husband. She may bind herself, by consent in court, to the sale, or she and her husband may make a sale at their pleasure. As to this property and to this extent, her husband concurring, she is *sui juris*.

We have been unable to find any case where the power attempted to be exercised in this case, when the contest was between life-tenant and remainderman, has been held constitutional.

The following authorities sustain the view here expressed:

Palairot's Appeal, 67 Pa. St., 479.

Kneass's Appeal, 31 Pa. St., 90.

Ervine's Appeal, 16 Pa. St., 263.

Washburn on Real Property, 3d vol. (4th ed.), pages 213 to 218.

12 Bush, 21, Robinson v. Swope.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

Burdine, &c., v. Pettus.

CASE 43—ORDINARY—FEBRUARY 15, 1881.

Burdine, &c., v. Pettus.

APPEAL FROM PULASKI CIRCUIT COURT.

1. In this suit against a county judge for accepting insufficient sureties upon a guardian's bond, there is no averment that appellee knew the sureties were insolvent when they executed the bond, or that he had any reason to believe that their estate was insufficient to secure the ward.
2. There is no averment that the evidence heard by appellee was insufficient to satisfy one of ordinary judgment that the sureties were insolvent, or that he failed to hear any proof on the subject.
3. The petition is insufficient.

MORROW & NEWELL FOR APPELLANT.

It was not necessary to aver that execution upon the judgment against Hale, the guardian, had been returned "no property found," to maintain the action. The allegation is that appellee, as county judge, accepted insufficient security on the bond. The petition contains a cause of action. (Stanton's Rev. Stat., chap. 43, art. 1, sec. 4; Daniels v. Vertrees, 6 Bush, 4; Coulter v. McIntyre, 11 *Ib.*, 565; Ky. Law Rep., vol. 1, 66.)

W. H. PETTUS FOR APPELLEE.

1. If the county judge is satisfied of the sufficiency of the security offered, he cannot be held liable to the ward.
2. He accepted the sureties in good faith. There is no averment that he knew or believed the sureties were insolvent, or that the evidence before him would convince one that such was the case. (Sec. 5, art. 1, chap. 48, Gen. Stat.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The fourth section of article I, chapter 48, General Statutes, provides, that "if the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judge so in default and his sureties shall be jointly and severally liable to the ward for any damage he may sustain thereby." It is alleged in the petition in this case that the appellee (the county judge) accepted the covenant, and the sole ground of recovery is, that the sure-

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ties at the time they executed the bond were insolvent, and have so continued since. There is no allegation that the county judge knew they were insolvent at the time they executed the bond, or that he had any reason to believe their estate was insufficient to fully secure the ward; nor is there an averment that the evidence heard by the judge was insufficient to have satisfied one of ordinary judgment that the sureties were insolvent, or that he failed to hear any proof on the subject. The effect of a judgment against the county judge on such a petition would be to make him an insurer of the solvency of all the sureties accepted by him on such bonds, and prevent any prudent man from holding such a position. If the judge, after hearing the testimony as to the sufficiency of the sureties, is satisfied that they are solvent, and the evidence is such as would satisfy one of ordinary judgment of that fact, he has discharged his duty, and having accepted the bond, this presumption will be indulged until the contrary is made to appear.

Judgment affirmed.

CASE 44—EQUITY—FEBRUARY 15, 1881.

Napper, &c., v. Yager, &c.

APPEAL FROM NELSON CIRCUIT COURT.

A suit instituted for the purpose of having conveyances set aside as voluntary and made to hinder and delay creditors, cannot be maintained without a judgment and return of *nulla bona*.

JNO. H. WATHEN FOR APPELLANT.

When a demand is purely legal, before attacking a conveyance as fraudulent, the plaintiff must have had his judgment and return of no property, otherwise his action cannot be maintained. (*Halbert v. Grant*, 4 Mon., 581; *Poague v. Vance*, 6 J. J. Mar., 83.)

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C. T. ATKINSON AND MUIR & WICKLIFFE FOR APPELLEES.

1. There is no doubt from the proof that the conveyances were fraudulent. (Gen. Stat., chap. 44, art. 1, secs. 1, 2; chap. 44, art. 2, sec. 1; 11 Bush, 353; Cogar v. Stewart, MS. Opin., 1879; Gen. Stat., chap. 24, secs. 2-14.)
2. A return of *nulla bona* is not necessary. (Haskell v. Wynn, MS. Op., 1877, Barb. Dig.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

At the time the deed from Richard Napper to John H. Napper was made the latter was not a creditor of the former, and consequently the deed did not operate to prefer him as a creditor.

The deed was made in compliance with the bond executed in 1874, five years before the deed was executed.

At the time of the execution of the bond John was a creditor, and his debt was satisfied by crediting it on the price he agreed to pay for the land. But that transaction is not attacked. There is no allegation that Richard Napper made the bond in contemplation of insolvency, or with the design to prefer one or more creditors to the exclusion, in whole or in part, of others. And it is quite clear, that if no such facts existed when the bond was made, its validity cannot be affected by Richard's subsequent insolvency.

If it had been alleged and proved that Richard made the bond in contemplation of insolvency, and to prefer John as a creditor, the fact that a deed was made and recorded within six months before these suits were commenced would have raised the question, whether the period limited in the statute for commencing a suit to enforce its provisions commenced to run when the bond was executed and possession taken under it, or not until the recording of the deed. But as no attack was made on the contract evidenced by the bond, no such question arises.

Napper, &c., v. Yager, &c.

We are therefore of the opinion that the appellees failed to make out against John H. Napper a case coming within the provision of article 2 of chapter 44 of the General Statutes.

Ludwick denies that he was a creditor of Richard Napper at the time the deed to him was made. The evidence shows that he married Napper's daughter in 1872, and that it was soon afterward agreed between Napper and himself that he should let Napper have whatever money he could spare from time to time, and should receive a conveyance of land at a reasonable price for the money so advanced. Under that agreement, Ludwick took charge of the farm, and advanced money to Napper, and boarded a young lady for him, to the amount in the aggregate of more than \$700, and under that agreement the deed in question was made.

The money thus advanced did not create the relation of debtor and creditor. The money was not to be repaid in kind. It was received in payment for land Napper had agreed to convey, and although the agreement was in parol, and could not have been enforced by Ludwick, yet he would not become a creditor on account of the payments so made until the contract was repudiated by Napper, and as that was never done, he never became a creditor; and the conveyance was therefore not within the statute.

The suits brought to have the conveyances set aside as voluntary and made to hinder and delay creditors were premature.

Such suits cannot be maintained without judgment and return of *nulla bona*. (Moffat v. Ingham, 7 Dana, 495; Halbert v. Grant, 4 Mon., 581; Poague v. Boyce, 6 J. J. Mar., 83.)

Olsen's adm'r v. Rich.

In *Haskell v. Wynn*, MS. Opinion, cited in section 130, *Barbour's Digest*, title "Fraudulent Conveyances," one of several plaintiffs in consolidated suits had a return of no property.

Wherefore, the judgments are reversed, and causes remanded with directions to dismiss absolutely so much of the petition of Mrs. Yager and the cross-petition of Foxworthy as seeks relief under article 2, chapter 44, General Statutes, and to dismiss the residue without prejudice.

CASE 45—ORDINARY—FEBRUARY 15, 1881.

Olsen's adm'r v. Rich.

APPEAL FROM KENTON CIRCUIT COURT.

Although a public administrator resigns his office, he is still the representative of each and every estate committed to his hands before his resignation. He must administer such estates, and his sureties are bound for the faithful discharge of his duties as to each estate so committed to him.

ROBT. B. FISK FOR APPELLANT.

Appellant's brief withdrawn.

SIMMONS & SCHMIDT FOR APPELLEE.

When appellant resigned his office of public administrator, he vacated his position as administrator of Olsen, and the court properly dismissed the action. (*Warfield v. Brand*, 13 Bush, 88; *Renfro v. Trent*, 1 J. J. Mar., 604; *Gray v. Grundy*, 2 *Ib.*, 133; *Davenport v. Irvine*, 4 *Ib.*, 60; Gen. Stat., 454; *Marshall v. Marshall*, 4 Bush, 251; Gen. Stat., 443.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Section 47 of article 2 of chapter 39, General Statutes, provides, that "there shall be appointed in each county in this state, by the county court thereof, a discreet, fit person to act as administrator of decedents' estates of which there is no personal representative, and as guardian of such orphans

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as have none." Under this section of the statute, the county court of Kenton, on the 26th of August, 1875, by an order of that court, appointed the appellant public administrator, and the latter qualified as required by law.

On the 5th of December, 1877, by an order of the same court, he was appointed administrator of the estate of John Olsen, the order reciting: "Ordered, that L. J. Blakely, public administrator and guardian of Kenton county, be, and he is hereby, appointed administrator of the estate of John Olsen, deceased, more than three months having elapsed since his death, and no one having applied for letters of administration on his estate." In July, 1878, the appellant appeared in court and tendered his resignation as public administrator, which was accepted, and William Gray appointed a special commissioner "to make a settlement *with him of all trusts in his hands as administrator.*" After his resignation as public administrator, the appellant, on the 5th of October, 1878, instituted the present action as the administrator of the estate of John Olsen, and the court below, being of the opinion that his resignation of the office of public administrator having been tendered and accepted prior to the institution of the action, held that it was a surrender of all the trusts confided to him by reason of his office, and dismissed the action.

The appellant, by reason of his appointment and qualification as public administrator, was ordered to take charge of the effects of the decedent, and to act in every respect as if he had qualified by giving bond with surety as the personal representative of the particular estate. The general bond he had executed made his sureties responsible for the faithful discharge of his duties in administering each and all the estates committed to his care as the public administrator. It

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was in fact the bond in each particular case; and after administering, either by an order of the court or taking charge of the effects by reason of his being the public administrator, his resignation of that office did not relieve him or his sureties from fully administering the estates under his control at the time, and his successor in office cannot deprive him of the right to fully administer an estate already in his hands, or release his sureties by voluntarily assuming to relieve the former administrator from responsibility.

He may be removed from office for cause shown, as is provided by section 48 of the same statute, or may resign his trust after a settlement of his accounts, as provided by section 46; but a resignation of his public office still leaves him the representative of each and every estate committed to his hands. He is no longer the public administrator, but is the administrator of the estates in his hands unadministered, with the same liabilities and duties as an ordinary administrator. He became such administrator in fact when ordered to take charge of the estate. Section 49, article 2, provides, that "the several county courts of the commonwealth in which there is a public administrator and guardian, shall confide to him the administration on the estates of deceased persons in all cases in which by law the jurisdiction to grant letters testamentary or administrative applies, if it shall appear, after the expiration of three months from the death of the decedent, that no one will qualify as executor, or apply for administration," &c. When this estate was confided to the appellant as administrator, it was a personal trust. He was required to make an inventory and settlement of the estate as the administrator of Olsen, and not as the public administrator, nor was the appointment of his successor retroactive, so as to make him the

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administrator of all the estates that had been confided to the care of the appellant. Such a construction of the statute, besides multiplying the costs of administration, would lead to the greatest confusion in determining the liability of each of the personal representatives.

The successor of the public administrator may be required, by virtue of his office, to take charge of the estates upon which no administration has been had for three months after the death of the decedent, and where no administrator has been previously appointed and qualified; but if there is already an administrator, the county court has no power to remove him, except for the causes provided by the statute.

The public administrator is made the administrator of the particular estate by an order confiding it to him by the county court, and when undertaking to administer, he has no right to surrender the trust, unless his resignation is accepted by the court as required by the statute, but must proceed to a final settlement, and is liable on his bond on his failure to fully administer. The appellant never tendered his resignation as the administrator of Olsen, and was therefore the proper party to institute the action, and it was error on the part of the court below to dismiss it. The answer filed by the appellee, although containing much surplus matter, amounts to a denial of the negligence charged to have caused the death of the intestate. The history appellee gives of the caving in of the embankment or dirt constitutes no defense, and whether or not appellee was guilty of willful neglect is with the jury to determine. It is not necessary to notice the other errors assigned, as they are not prejudicial to the appellant.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

Melone, &c., v. Armstrong.

CASE 46—EQUITY—FEBRUARY 15, 1881.

Melone, &c., v. Armstrong.

APPEAL FROM SHELBY CIRCUIT COURT.

Where a husband finds it necessary to sell, and does sell land to pay purchase-money due thereon, although he sells more than will pay the lien upon it, if he sells in good faith his widow is not entitled to dower in any part of the land.

CALDWELL & HARWOOD FOR APPELLANT.

The husband was compelled to sell, and sold the land to pay purchase-money due thereon. Having sold in good faith for that purpose, the widow is not entitled to dower, although more land was sold than would pay the purchase-money. The deed passed appellee's dower. (13 B. M., 535; 1 M. & B. Stat., 448; 3 Bush, 360; 2 Rev. Stat., chap. 24, secs. 22, 23; *Ib.*, 1 vol., art. 4, sec. 6, chap. 47, p. 26.)

M. T. CARPENTER FOR APPELLEE.

1. Appellee is clearly entitled to her dower. (Rev. Stat., chap. 24, secs. 22, 23, 24.)
2. Appellee's title did not pass by the certificate. (Hilliard on Real Prop., vol. 2, 499; 11 Bush, 596; 13 B. Mon., 534; 13 Bush, 65; 14 *Ib.*, 79; Bigelow on Estoppel, 485; 3 Bush, 702; 3 J. J. Mar., 300; 5 *Ib.*, 243; 8 B. Mon., 229; *Teal v. Ford*, 7 Bush, 156; 7 Bush, 222.)

J. C. COOPER FOR APPELLEE.

The deed as to appellee is void. The certificate does not conform to the statute. (*Barnett v. Shackelford*, 6 J. J. M., 533; *Prebble v. Hall*, 13 Bush, 65; *Thomas v. Thomas*, 16 B. Mon., 425; 5 J. J. M., 121; *Ib.*, 135; 6 Dana, 390; 6 J. J. Mar., 533.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

Samuel Armstrong owned a farm containing 297 acres. He owed a balance of purchase money amounting to the sum of about \$4,000, secured by a lien on the land, which he had no means of paying, except by a sale of a part or all of the land. Being thus situated, he sold the whole tract to Malone & Bonney for \$5,945, the purchasers agreeing to take up the unpaid purchase-money notes. The residue of the price was paid to Armstrong, or applied by his consent to the payment of his debts, except the sum of about

79 248
92 196
94 461
79 248
114 294
115 238
115 237

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\$1,200, which was attached by one of his creditors, and applied under a judgment of the court to satisfy the debt.

Armstrong having died, his widow brought this suit, claiming dower in the land.

The court below adjudged that she was entitled to dower in a part of the land bearing the same proportion to the whole that the balance of purchase-money due from Armstrong bore to the price for which the land was sold.

This appeal is prosecuted to reverse that judgment.

Section 6 of article 4 of chapter 47 of the Revised Statutes, in force when the sale was made, reads as follows:

"The wife shall not be endowed of land sold but not conveyed by the husband before the marriage; nor of land sold *bona fide* after marriage to satisfy a lien or encumbrance created before marriage, or created by deed in which she joined, or to satisfy a lien for purchase-money. But if there is a surplus of the land or proceeds of sale after satisfying the lien, she shall have dower or compensation out of such surplus, unless the surplus proceeds of sale were received or disposed of by the husband in his life-time."

This statute evidently contemplated that a sale might be made by the husband, and that he might sell the whole or only so much as would satisfy the lien, but whether sold by the husband or under the judgment of a court, if the whole be sold *bona fide* because there is a lien for purchase-money, and with a view to satisfy it in the manner deemed by the husband to be most beneficial to him, and with no design to deprive the wife of her potential right of dower, she will not be entitled to dower, although less than the whole would have satisfied the lien.

That the statute contemplated that a sale might be made of more land than was necessary to satisfy the lien is shown

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by the fact that it provides that the wife shall be compensated for dower out of the surplus proceeds of the sale, in case the husband dies without receiving or disposing of such surplus.

The evidence in this case shows that the sale was made in good faith to satisfy a lien for purchase-money which the husband had no other means of discharging, and which amounted to two thirds of the value of the whole tract, and was past due when he sold the land. Under these circumstances, it was for the husband to decide whether he would sell the whole or only so much as would pay the balance of the purchase money, and having sold the whole, his widow has no right to dower in any part of it.

To decide otherwise would be to render the statute inoperative, so far as it authorizes a sale free of dower of more land than is necessary to satisfy the lien.

This conclusion renders it unnecessary to consider other questions made in the argument.

Wherefore, the judgment is reversed, and the cause remanded with directions to dismiss the petition.

2r 260
87 446

CASE 47—EQUITY—FEBRUARY 1, 1881.

Wooldridge v. Jacob's guardian.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The act of 1878, directing that before land is sold it shall be valued, and if it sell for less than two thirds of its value, shall be liable to redemption, has no application to a sale of land made by judgment of a court upon the petition of a guardian under article 3, chapter 63, General Statutes.
2. There is no redemption in such cases.

Woodridge v. Jacob's guardian.

BYRON BACON FOR APPELLANT.

1. The court below erred in adjudging the purchaser's response insufficient.
2. An infant should have the privilege of redemption, inasmuch as he cannot control the sale of his land.

SIMRALL & BODLEY FOR APPELLEE.

1. The act of 1878 does not apply to this case. The only object of that act is to protect a judgment debtor against the sacrifice of his land at execution sale.
2. The sale is not void, even if the act does apply to the case. (Watson v. Violett, 2 Duv., 333.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

Although the language of the act of April 9, 1878 (Acts 1878, page 122), is, that before *any* real estate shall be sold under an order or judgment of a court, it shall be valued, and if it does not sell for two thirds of such valuation, the defendant or his representatives may redeem it, it was not intended to apply to a case like this, in which the real estate of a ward is sold on the petition of the guardian under article 3, chapter 63, General Statutes.

Real estate sold under execution was required to be valued, and the defendant had the right to redeem within twelve months, unless it should sell for two thirds of such valuation; but no such right had previously been given to a debtor whose property was sold by commissioner under judgment directing the sale. Without such a law, the real estate of debtors was often sacrificed at judicial sales, and to prevent such sacrifice by allowing the debtor to redeem, and thus to place all coercive sales of real estate for the satisfaction of debts upon the same footing, was the sole object the legislature sought to accomplish by the act under consideration. This is evident from the character of the act and the history of the time when it was passed, and is rendered entirely clear by the fourth section, which, referring to the sales.

 Bayless, &c., v. Prescott, &c.

mentioned in the preceding sections, declares, that "if the judgment in pursuance of which such sale is made be not satisfied by such sale, the right of redemption herein provided for may be sold in satisfaction of the residue of such judgment."

This shows that the legislature had in mind only such sales as were made under judgments against debtors.

To construe the act in such way as to embrace sales made under judgments rendered at the instance of those interested in the land, or of those authorized by law to act for them, would be most disastrous in cases like this, where the object is to sell at the best possible price for the sole benefit of the owner. The uncertainty whether the accepted bidder would get the property would deter bidders and reduce the price realized without any corresponding benefit to those interested.

Judgment affirmed.

2r	252
86	160
79	252
99	306
79	252
118	525

CASE 48—EQUITY—FEBRUARY 15, 1881.

Bayless, &c., v. Prescott, &c.

APPEAL FROM BOURBON CIRCUIT COURT.

The word survivor, in the absence of any explanation by the deviser in any part of the will, must be interpreted according to its literal meaning, and points to those who outlive the first devisee.

BRENT & McMILLAN AND HUSTON & MULLIGAN FOR APPELLANT.

The deviser meant by the word survivors those who had not in the meantime died without issue, or who, having died, had left issue, as well as those who, with or without issue, actually survived. (*Birney v. Richardson*, 5 Dana, 429; 8 Vesey, 10; 14 *Ib.*, 578; *Roper Leg.*, vol. 1, 426; *Haskins v. Sale*, 25 Penn.)

Bayless, &c., v. Prescott, &c.

M. C. JOHNSON FOR APPELLEE.

In the limitation as to Phœbe, daughter of the devisor, there is nothing to confine the operation of the fact of her death without children to any period whatever. Only those who actually outlived her take the estate after her death. (*Birney v. Richardson*, 5 Dana, 424; *Jarman on Wills*, 2d vol., 608; *Ib.*, 610; *Best v. Conn*, 10 Bush, 38.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Nathan Bayless, sr., by the third clause of his will, devised to his daughter, Phœbe Hutsell, two hundred acres of land, with this limitation :

“Should she die leaving no child or children of her body, it is my will, and I do ordain it, that the said two hundred acres of land shall go to, and be inherited by, such of my devisees as shall survive the said Phœbe.”

Phœbe Hutsell, Mary Prescott, Nancy Bowles, Nathan Bayless, jr., and Hannah Bayless were his devisees. The last was his widow, and the rest were his only children.

Phœbe died childless in 1876.

All the devisees, except Mary Prescott who claims the two hundred acres of land under the limitation quoted, had died during Phœbe's life-time.

The widow had not again married. The devisee Nancy Bowles left a number of children, who are made appellees.

And the devisee Nathan Bayless, jr., left the appellant, his only child, who controverts the claim of appellee Mary Prescott, and asserts that the children of the deceased devisees took an equal share per stirpes in the land with her.

The only question, therefore, is the construction of the limitation upon the devise to Phœbe.

It created in her a fee subject to be defeated by her death without child or children.

The contingency upon which depended the quantity of her estate in the two hundred acres having occurred, and the

Bayless, &c., v. Prescott, &c.

testator having made a disposition of it to take effect upon the happening of that contingency, the persons to whom he devised it must be ascertained from his language according to its plain and ordinarily accepted sense, as there are no other provisions of the will which shed much, if any, light upon the testator's intentions with respect to the limitation placed on Phœbe's devise.

The plain import of his language is, that the land shall go to any of the persons named as his devisees who should live longer than Phœbe, and to no other person, whether related to the devisees or not.

The appellee Mary Prescott was a co-devisee with Phœbe, and the only one who survived her, and therefore literally and exclusively within the language of the limitation.

There is nothing expressly or impliedly said about the land going to the children or descendants of such of the devisees who should die leaving any, nor is the word survive used with reference to them.

The word survive, which is employed by the testator, was used by him to designate the individual devisees who should outlive the others.

To hold that the words, "such of my devisees as shall survive the said Phœbe," are equivalent to the testator saying that he gave the land to his other devisees or their survivors, would not be construing but altering the language of the will, which is unambiguous, and so plain that there is hardly room for construction.

But there is a sensible and legal disposition of this identical question in an opinion by Judge Peters, in the case of *Best v. Conn*, 10 Bush, page 38.

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The language of the limitation contained in that case was:

"If either of the aforesaid legatees die without issue, then the portion which he or they were entitled to *is to go to the survivors equally.*"

By an evident oversight, it was stated in the opinion that the persons named in the will who first took the property under it were invested with "a life estate," instead of a defeasible fee, and the conclusion reached demonstrates the inadvertence.

It was held that the devisees who survived one of their number, dying without issue, on his death took the portion set apart to him, in exclusion of the children of a devisee who died in the life-time of the latter.

That decision is assailed by counsel for the appellant, who assert that it unsettles a rule of construction which has obtained for forty years in Kentucky, but admit that it is conclusive of this case unless it be overruled.

And we are asked to do so on the authority of *Birney v. Richardson, &c.*, 5 Dana, 424, and the British cases therein cited. Counsel have been unable to cite any other Kentucky case, yet insist that *Birney v. Richardson* is authority, although the court on the point at issue here, in that case used this language: "But we have not deemed it necessary to speak more definitely on this point, *or to give a judicial opinion respecting it*, because, in our judgment, the testator intended only a dying without issue in the event of his wife's marriage and prior thereto."

The case turned upon the *time* of distribution, after which it was held there could be no division of a child's portion who may have died childless subsequent to the widow's marriage, upon which the period of distribution depended.

Bayless, &c., v. Prescott, &c.

In the case of *Davidson v. Dallas*, 14 Vesey, jr., page 577, the testator had by his will bequeathed to the children of his brother Robert £3,000, to be equally divided among them, with this limitation annexed: "And if either of them should die before the age of twenty-one years, their share to go to the survivors."

After the testator's death two children were born to his brother Robert, and it was held that these after-born children were not included by a proper construction of the word "survivors," and that those children only who were living at the death of the testator were entitled. A different view having been adopted, it was declared by Lord Eldon to be a forced construction of the term "survivors."

That case does sustain the opinion in *Birney v. Richardson, &c.*, on the adjudged question.

While there is learning displayed in the dicta of the latter opinion in agreeing with Lord Eldon's view, who construed the word "survivors" as synonymous with "others," in *Wilmot v. Wilmot*, 8 Vesey, jr., page 12, yet it is there expressly decided that the rule was based alone upon a presumption which opposed the literality of the will, whose context, it was held by various authorities in note 3 to *Milsum v. Awdry*, 5 V., 465, and *Perry v. Woods* 3 V., 204, may exclude that construction, which seems to have been adopted more to supply wills with words on account of supposed defects of expression than to construe the language they actually contain. The probable intention of the testator cannot, in our opinion, be reached by departing from the language of the will, which must be construed and not changed. In the absence of all explanation by the rest of the instrument, the word survive, as used in Bayless' will,

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must be interpreted according to its literal and plain meaning, this being the rule established by a number of cases.

In the case of *Ferguson v. Dunbar*, 3 B. C. C., 468, Lord Thurlow said, "he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare G as the only surviving child entitled to the whole of E's share."

The will construed in the case of *Crowder v. Stone*, 3 Russell's Chancery Reports, 217, contained a clause similar to the limitation in the will before us, and in construing it, Lord Lyndhurst held that the survivor was entitled to the whole. And in speaking of the construction which appellees' counsel contend for, he said the court may sometimes be compelled to adopt it in order to accomplish the intention which *appears on the whole of the will*.

In the case of *Ranelagh v. Ranelagh*, 2 Mylne & Keen, 441, the language of the limitation was this: "In case of the demise of any of the above parties (meaning the first devisees) without legitimate issue, their, his, or her proportions to be divided among the *survivors*."

And Lord Brougham said, in substance, that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die.

Such was the construction in *Cromek v. Lumb*, 3 Younge & Collyer's Eq. Exch., page 566.

In view of these authorities, and the very strong language of Jarman on Wills, on page 435, where, in referring to them and the construction adopted in *Wilmot v. Wilmot*, *supra*, he said, "we are now taught, by a series of decisions.

Hirschman v. Brashears, &c.

which outweigh any opposing dicta or opinions, that the word 'survivor,' like every other term when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning," we are convinced that the rule laid down in *Best v. Conn* is sustained by reason and authority.

And the judgment is therefore affirmed.

2r	258
4r	189
79	258
92	667
79	258
98	537
79	258
113	515

CASE 49—EQUITY—FEBRUARY 18, 1881.

Hirschman v. Brashears, &c.

APPEAL FROM CARROLL CIRCUIT COURT.

1. The will creates in Mrs. Brashears a separate estate.
2. The power to sell the separate estate of the wife does not include the power to mortgage for the debts of the husband.

JNO. & J. W. RODMAN AND MASTERSON & GAUNT FOR APPELLANT.

1. The will does not prevent any of the devisees from subjecting the estate devised to the payment of any debt they may bind themselves to pay. (*Petty v. Malier*, 14 B. Mon., 247; 5 B. Mon., 327; 7 Bush, 461.)
2. It is against the policy of the law that property shall be given to a person, and that the devisee shall not be able to dispose of it.

J. A. DONALDSON FOR APPELLEE.

The will makes the property the separate estate of Mrs. Brashears, and interdicts its conveyance, by mortgage or otherwise, to pay her husband's debts. (*Griffith v. Griffith*, 5 B. Mon., 144; *Hutchinson v. Jones*, 1 Duv., 76; *Shackleford v. Collier*, 6 Bush, 157; 8 *Ib.*, 395; 18 B. Mon., 306; 3 Met., 244; 17 B. Mon., 59; 2 Bush, 115.)

CHIEF JUSTICE COFER DELIVERED THE OPINION OF THE COURT.

The intention of the deviser that the land should not be made subject to the husband's debts is very clear from the will, and this intention would be disregarded if a judgment enforcing the appellant's mortgage was rendered.

Alderson v. Trent.

In our opinion, the will creates in Mrs. Brashears a separate estate; and although she and her husband may have had power to sell it, or her interest in it, they could not mortgage it to secure his debt. The statute provides that the separate estate of a married woman may be sold and conveyed by her and her husband, and trustee, if there be one, but that no such sale shall be made when forbidden by the deed or will under which it is held, "but her interest in the proceeds shall be the same as it was in the estate;" thus showing, that in giving power to sell, it was not the purpose of the Legislature to include in it the power to mortgage for the husband's debts, which would defeat the right of the wife to a separate estate in the proceeds.

Judgment affirmed.

CASE 50—ORDINARY—FEBRUARY 19, 1881.

Alderson v. Trent.

79	259
119	61

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

1. The traverse bond was defective.
2. It was the duty of the court, under section 682, Civil Code, to allow appellant, within a reasonable time, to execute a new and sufficient bond.

THOS. E. WARD FOR APPELLANT.

Although the bond originally executed may have been defective, it was the duty of the court below to give reasonable time to appellant for the execution of a new bond. (Sec. 682, Civil Code; *Waters v. Patrick*, 1 Bush, 224.)

No brief for appellee.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Upon a traverse of an inquisition of forcible entry and detainer, the appellant executed bond substantially in con-

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formity to the provisions of section 463, Civil Code, except the amount of the liability to which the obligors might be subjected was limited to the sum of one hundred dollars.

On motion of the appellee, the traverse was dismissed because the bond was so limited.

It was a defective bond, for the reason that the costs and damages to which the traverser might be subjected may exceed the sum of \$100.

And the law, found in section 463, *supra*, requires bond to be given for the costs of the proceeding and all damages that may be caused to the traversee by the traverse, if it should not be prosecuted with effect.

But the court erred in refusing to allow the appellant to execute a new and sufficient bond within a reasonable time, which he had the right to do under the provisions of section 682, Civil Code, that reads:

"If a bond provided for by this Code be adjudged to be defective, a new and sufficient bond may be executed in such reasonable time as the court may fix, with the same effect as if originally executed."

Wherefore, the judgment is reversed, and cause remanded for further proper proceedings.

CASE 51—EQUITY—FEBRUARY 19, 1881.

Field v. Chipley, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. A contract by which the clerk of the Louisville chancery court transfers and assigns to a trustee for the benefit of appellant, in consideration of a debt due him, all the fees and emoluments of his office in the future, until the debt is paid, with conditions to pay deputies, &c., is void.

79	280
e110	246
111	91
e111	92
79	280
114	520

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2. It is against public policy that such contracts be enforced.
3. The Auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them.

BIJUR & DAVIE FOR APPELLANT.

1. A clerk of a court can make a valid assignment of his fees to become due.
2. The reservations in the contract for the benefit of appellee and his creditors are not binding upon appellant, appellee being the debtor and repudiating the contract. (Combs v. Brashears, 6 J. J. Mar., 631; High on Receivers, sec. 22; Clark v. Tilley, 31 Ind., 121; Ciples v. Blain, Rice's Eq. Rep., S. C., 60; 2 Allen, 40; Benjamin on Sales, 78; Parsons on Con., vol. 1, 523; Whitehead v. Root, 2 Met., 586; 11 Iowa, 572; 15 *Ib.*, 284; 40 Penn., 276; 2 Selden, 179; 18 Pick., 168; 5 Gray, 49; Brackett v. Blake, 7 Met., Mass., 335; 2 Allen, 541; 2 Gray, 565; 28 Ver., 20; 15 Wisconsin, 75; Merriwether v. Herman, 8 B. Mon., 164; 5 *Ib.*, 142; Speed v. Brown, 10 *Ib.*, 110; Rodman v. Musselman, 12 Bush, 354; 2 Russell & Mylne, 35; 10 Simons, 542; 27 Law Jour. Ch'y, 592; 3 Gifford, 467; 10 Beavan, 491.)

GOODLOE, ROBERTS & HUMPHREY FOR APPELLEE.

A clerk cannot assign fees to become due for services to be performed in the future. The contract is against public policy, and is void. (Forward v. Proctor, 9 B. Mon., 124; Phillips v. Winslow, 18 *Ib.*, 431; Ross v. Wilson, 7 Bush, 32; 9 *Ib.*, 318; Vinton v. Hallowell; Hutchinson v. Ford, 9 Bush, 318; Gen. Stat., chap. 81, sec. 1, p. 681; Combs v. Brashears, 6 J. J. Mar., 6; Petty v. Roberts, 7 Bush, 419; 7 Mon., 10.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

S. F. Chipley, the clerk of the Louisville chancery court, being indebted to Neill B. Field in the sum of about \$28,000, evidenced by several promissory notes, for the purpose of securing its payment entered into an agreement with Field by which Chipley transferred and delivered to John G. Walker "*all the demands* and claims due to him, the said Chipley, as fees of his said office, which have accrued between the 1st of August, 1877, and the 27th of February, 1878, and further agreed to assign to the said Walker for a like purpose all claims due to him, the said Chipley, as fees

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of his said office, which shall accrue to him hereafter, or from the date of the agreement until the debt of Field is paid," the same to operate as a transfer and assignment of such claims, demands, and fees as they accrue. Walker, as trustee, was designated as the collector for the parties, and at the end of each month the trustee is to pay over to the said Field the collections made, except as follows:

He is to pay to the deputies of said clerk, as salaries, and for the other expenses of said office, \$330; to S. F. Chipley, the clerk, \$225; to the Farmers and Drovers' Bank, \$250 on a debt of \$1,300 due that bank; to the Auditor of Public Accounts, until the debt of said clerk for back taxes is paid, \$115. For making transcript of records the trustee is to pay the amounts due from the office to Benj. F. Field and George McGowan. The sums collected by said Walker as taxes on suits hereafter brought shall be kept entirely separate from said account, and shall by him be paid over to the state, and the said Field is given no right thereto.

Chipley further agrees to make Field a power of attorney, giving him full power to collect or appoint collectors in Chipley's name, if Field sees proper to do so, and to distrain for the same in said Chipley's name where it is a proper cause for distraint. This last clause applies to fees already delivered to Field. The trustee is to make a monthly statement of his accounts, and the books of the office are at any time to be open to the inspection of said Field's agents or counsel for the purpose of investigating and overlooking the conduct of said trust.

The appellant Field instituted this action in equity in the Louisville chancery court, alleging that the trustee Walker had resigned his office on the 10th of February, 1879, and that Chipley, the defendant, had refused to have another

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trustee appointed in his stead; that Chipley is insolvent, and is proceeding to collect the fees of the office without applying the proceeds to the payment of his debt. He asks for a temporary injunction restraining the appellee from collecting his fees, and the appointment of a receiver for that purpose, and that the collections be applied in the manner agreed on by the parties. The chancellor, on the hearing below, adjudged the appellant entitled to the fees already assigned and delivered, but dismissed the action as to appellant's claim to the fees of the office to become due, or that might accrue after the date of the contract. The judgment below is made to rest on two grounds: first, it is an agreement to sell something not in existence; second, that the contract is against public policy.

As to the first question raised, counsel for the appellant has referred to several authorities sustaining the validity of such an agreement, but the whole current of authority in this state is opposed to such a doctrine. The case of *Whitehead v. Root*, reported in 2d Metcalfe, in no manner sustains the position assumed by counsel, and instead of determining that the title to the whisky would vest in the purchaser in that case as the whisky was made, a contrary conclusion was reached, by which the appellant was confined to a recovery in damages for the failure of the appellee to comply with his contract. *Root & Co.*, in that case, being distillers, sold to *Whitehead & Co.* ten thousand dollars' worth of whisky at twenty-one cents per gallon, to be delivered within twelve months from the date of the contract. The whisky was not made or in existence at the time, and the court below held, for that reason, the contract invalid, or overruled a demurrer to an answer presenting such a defense. This court in that case recognized the distinction

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between existing contracts for the future delivery of property and sales of like property. In the latter instance, the title passes, and where there is only an agreement to sell, and a violation of that agreement, the party injured can only recover such damages as he may have sustained in consequence of the breach. The cases of *Hutchinson v. Ford*, 9th Bush; *Newcomb v. Cabel*, 10th Bush; *Moss v. Meshew*, 8th Bush, recognize this rule. Waiving, however, the consideration of this question, the present contract should be declared void, as being against public policy and in effect a sale of the appellee's office.

Section 1 of chapter 81, General Statutes, provides, that "no office or post of profit, trust or honor, under this Commonwealth, whether civil or military, legislative, executive, ministerial, or judicial, nor the deputation thereof, in whole or in part, shall be sold or let to farm by any person holding or expecting to hold the same. The person selling or letting, and the person buying or recovering, or with whose knowledge the same has been bought for him by another, shall be disqualified from holding such office or post, or the deputation thereof, and, upon conviction, shall be expelled therefrom." The second section reads, "except as to bonds of indemnity from a deputy and his sureties given to a sheriff, sergeant of the Court of Appeals, clerk, or marshal, every contract or security made or obtained in violation of the preceding section shall be void." While the facts evidenced by the contract between the parties are not sufficient to subject them to the severe penalties imposed by the statute, the chancellor, when asked to enforce such an agreement, conceding that he can exercise such a power over the subject-matter, will not close his eyes to the contents of the agreement, or the consequences that must necessarily follow

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from the recognition of appellant's right to demand that every order and record in the office of his clerk shall always be open to the inspection and investigation of the appellant, his trustee, and a receiver, if one should be appointed by the court. Assuming that the consideration for which this contract was executed by the clerk was for money loaned, and this is not questioned, the entire proceeds of the office has been turned over to the appellant, and the appellee, the clerk, is performing the duties of the office under a stipulated salary, to be paid by the appellant or his trustee, with his subordinates paid in like manner, and such salaries as have been agreed on by the appellant and the appellee.

The appellee is to receive \$225 per month from the proceeds of his office, worth from ten to fifteen thousand dollars per annum, an office that of necessity requires the employment of many subordinates, their presence and labor being indispensable to the proper administration of justice. These employés are to be paid such sums as the trustee may see proper to pay them, as \$300 is the aggregate sum per month for their services and the expenses of the office. These expenses must embrace fuel, lights, &c., all of which are to be purchased with the funds that are intrusted to the trustee, and if payment is denied by him for these expenses or the salaries of employés, the doors of the clerk's office are closed, and the chancellor rendered powerless to act, by reason of the intervention of the trustee selected by the parties to this contract. Besides, the Auditor of Public Accounts finds, when calling on the clerk for taxes long since due on suits, &c., that this public money is in the possession of a trustee, who is required to pay into the treasury as much as \$115 per month, and the clerk, whose duty it is to retain the custody of this public money, has surren-

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dered all control over it. This contract makes the appellee the deputy of the appellant, with the obligation resting on the former to discharge all the duties of the office for the sum of two hundred and twenty-five dollars per month, his employes and the state to look to the appellant or the trustee for all the moneys to which they or either of them may be entitled. The chancellor will not permit his clerk to surrender such rights as are essential to the proper discharge of the duties of the office, and we have been cited to no case where a like contract has been enforced.

In the case of *Combs v. Brashear*, 6 J. J. Marshall, Luff, the deputy, was entitled to a certain part of the profits by reason of his services as deputy sheriff. In the case of *Cheek v. Tilley*, reported in 31st Indiana, the deputy clerk was entitled, by contract, to share the emoluments of the office, and in *Rice's Equity Reports* (South Carolina) the contract was of a similar nature, and the litigation originated as to the right to the fees after the principal clerk had made an assignment of his effects and retired from office. This class of cases has been held not to be in contravention of public policy, and while the chancellor might even decline to appoint a receiver in behalf of a deputy for services rendered in his own court, still such cases bear no analogy to the one being considered. While the fact of the appellee having appropriated the proceeds of his daily labor, both physical and mental, to the payment of appellant's demand may afford no reason for denying the latter relief, if by the agreement, as in this case, the public officer has surrendered such control over the future emoluments of his office as to deprive him of the means of procuring the necessary employes to transact the business of the office, or to defray the necessary expenses, it becomes at once the-

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duty of the chancellor to declare such contracts null and void. The contract in this case goes to a greater extent even than depriving the clerk of the means of defraying the necessary expenditures of the office, but has placed the funds of the state in the hands of the trustee, and beyond his control. If such a contract was valid at law, and for its violation damages could be recovered on account of a breach, still the chancellor, when asked to enforce its specific performance, in considering the inconvenience resulting from such a judgment, and its effect upon the public interests, should not hesitate to refuse relief.

If this contract can be enforced, it opens the door for speculation on the public offices of the state under the guise of a contract for the loan of money, and while the loan in this case may have been in good faith, and for no such purpose, the recognition of the validity of such agreements would prove so detrimental to the public interests that the chancellor should disregard them. The judgment is therefore affirmed

Judgment affirmed.

Dr 287
Cr 637

CASE 52—ORDINARY—FEBRUARY 23, 1881.

Ohio County Court v. Newton.

APPEAL FROM OHIO CIRCUIT COURT.

1. An appeal lies to the circuit court from the judgment of a court of claims, making to a county judge an allowance for his salary.
2. A mandamus does not lie.

WALKER & HUBBARD FOR APPELLANT.

1. A petition for a writ of mandamus is the only remedy. An appeal does not lie to the circuit court.

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2. The discretion of the county court, evidenced by their allowance to the judge, is the amount to which he is entitled.

J. E. FOGLE FOR APPELLEE.

1. It is clear that any person presenting a claim for an allowance before a county court of claims for twenty dollars or more, has an appeal to the circuit court. (2 Bush, 110; 11 Bush, 239.)
2. The remedy is not by mandamus.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellee, county judge of Ohio county, made application to the county court of claims for an allowance of five hundred dollars for holding county courts for the year ending September 1st, 1879. The court of claims made an allowance of three hundred dollars, from which appellee appealed to the circuit court, when, upon a trial before a jury, he obtained a judgment for one hundred dollars more than the allowance made by the court of claims, and from this last judgment the county court appeals.

The principal question made by counsel is, that the circuit court had no jurisdiction to revise the finding of the court of claims. They insist for appellant that the amount of salary to be paid the county judge is in the absolute discretion of the court of claims. In this we do not concur.

The General Statutes provides, section 11, article 17, chapter 28, that "the court, at the court of claims, shall make an allowance to the presiding judge, out of the county levy, for his services in holding the county courts."

We think this can mean nothing else than a reasonable allowance—an allowance commensurate to the character and quality of the services performed, and as the statute has provided in general terms for an appeal to the circuit court when any claim for as much as twenty dollars has been

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rejected, it is fair to presume that it was not intended to exclude the circuit court from appellate jurisdiction in this class of cases. If it had been the intention to make the court of claims the sole judge of the amount to be paid the county judge, and to take that out of the general class of claims presented to the court for allowance, and from a refusal to allow which an appeal is authorized, it is reasonable to presume that the statute would have contained words of exclusion as to jurisdiction of the circuit court.

The General Statutes provides that the court of claims shall allow to the county attorney a *reasonable* salary. In a case arising under that provision, we held that there was no absolute or arbitrary discretion in the court of claims to determine the amount of the allowance, and that an appeal would lie to the circuit court, notwithstanding the fact that the claimant in making his demand did not ask for any specific sum. (*Gudgell v. Bath County Court*, MS. Op., Oct. 21, 1880.)

There is nothing in the suggestion of counsel that appellate's remedy was by mandamus. Mandamus never lies to control discretion, but it may be used to compel its exercise. (*City of Louisville v. McKean*, 18 B. M., 17.)

It was proper to reject the evidence as to the amount of the income to the judge from the performance of the duties of his office other than that of holding county courts. For the other duties the law prescribes a specific compensation, and in addition to that, the provision is made for compensation for holding county courts. Whether the judge receives too much or too little for the other services performed by him cannot be considered in determining the question as to what his services are worth for holding county courts.

Hunt, &c., v. Semonin, &c.

The instructions given to the jury conform to the views of the law here expressed, and as those refused do not, it follows that there was no error either in giving or refusing instructions.

Judgment affirmed.

CASE 53—ORDINARY—FEBRUARY 23, 1881.

Hunt, &c., v. Semonin, &c.

APPEAL FROM BUTLER COURT OF COMMON PLEAS.

1. A motion to dismiss a petition, on the ground that it does not contain a cause of action, or that there is a misjoinder of parties, is not the practice. The Code provides otherwise.
2. Notice that the plaintiff will amend his petition is only required where he amends without leave of the court, and within less than five days before the term at which the defendant must answer.
3. Only the individuals composing a firm can be sued. They may be sued jointly or separately, whether they do business in one or any number of firm names.
4. As no motion was made to compel appellees to elect on which cause of action they would proceed, the *assignment of error in that regard cannot be considered.*

B. L. D. GUFFY AND WM. WARD FOR APPELLANT.

1. Appellants' motion to compel appellees to elect which cause of action they would prosecute should have been granted.
2. The general demurrer should have been sustained.
3. Appellee should have given appellants notice of the filing of the amended petition.
4. The liability of appellants, if it existed, was joint. The judgment is against them as individuals.

LYSANDER J. SMITH FOR APPELLEES.

1. There was no motion made to compel appellees to elect.
2. The petition contains a complete cause of action.
3. Appellants were not entitled to notice of filing the amended petition. (Civil Code, secs. 110, 136, 132, 134, 192, 363, 48, 40; *Nichols v. Burton*, 5 Bush, 322; 1st B. Mon., 201.)

Hunt, &c., v. Semonin, &c.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Appellees instituted suit against appellants on two promissory notes, one signed Hunt & Bro., and the other A. Hunt & Bro., alleging that they were merchants and partners, doing business at Rochester, Kentucky. Appellant, A. Hunt, appeared, and moved to dismiss the petition on the ground that it did not show a cause of action against him, and because there was a misjoinder of parties defendant.

The court properly overruled the motion, if not for other reasons, because it was not the manner such defects in the petition could be reached, even if they existed.

There being no motion made to compel appellees to elect on which cause of action they would proceed, the assignment of error on that ground cannot be considered.

After the motion to dismiss was overruled the court permitted the appellees to amend their petition, and aver that the appellants were partners, doing business under the firm names of A. Hunt & Bro. and Hunt & Bro., and refused to continue the cause, and rendered judgment against the appellants, who have appealed. They filed no answer, and there is nothing in the record showing that they could not be ready for trial in consequence of the amendment. (Section 136, Civil Code.)

The appellants assert that they were entitled to one day's notice of the appellees' intention to amend their petition. Not so. Such notice is required only where the plaintiff amends his petition without leave, and less than five days before the term at which the defendant is summoned to answer, as section 132, Civil Code, plainly states.

In a case like this, the amendment being made by leave of court, and in the presence of the defendants, no notice is necessary.

Fitzpatrick, &c., v. Apperson's ex'x.

It is insisted that it was error to render judgment against appellants as individuals, because the liability was shown to be that of two firms. Only the individuals composing a firm or firms can be sued. They are personally liable, and may be sued jointly or separately, whether they carry on their business in one or any number of firm names, where the same individuals compose each of the firms.

(Williams v. Rogers, 14th Bush; Sneed v. Kelley, 3 Dana, 538; Nichols v. Burton, 5 Bush, 322.)

Perceiving no error in the judgment, it is affirmed.

CASE 54—ORDINARY—FEBRUARY 26, 1881.

Fitzpatrick, &c., v. Apperson's ex'x.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. The bank and its assignees, by the receipt of a part of the money paid toward the redemption of the land, are estopped to demand a deed or to deny appellants' right to redeem.
2. The mere change of the payee or of a part of the obligors is not a payment of usury, but it is the creation of a new contract, and discharges the obligors on the old obligation; and if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted.

W. H. HOLT AND A. DUVALL FOR APPELLANTS.

1. If the purchaser allows the former owner of the land to redeem even in part, and after the lapse of a year charges him ten per cent., it is usury. (Williams v. Williams, 8 Bush, 241.)
2. This case is different from Smith v. Young (11 Bush, 393), but is similar to the case of Rudd v. Planters' Bank of Kentucky (MS. Opin., May, 1879).
3. When part of redemption money is paid, the purchaser and his assignee are estopped to demand a conveyance.

REID & STONE FOR APPELLEE.

1. Appellants are estopped to deny that Apperson owned the notes sued upon.

2r	272
4r	133
79	272
88	203
79	272
93	153
79	272
96	536
79	272
104	523
104	855
104	856
79	272
113	402
113	404

Fitzpatrick, &c., v. Apperson's ex'x.

2. The law and facts having been submitted to the court, the judgment must be treated as the verdict of a properly instructed jury.
3. Admitting that the record shows usury, the plea comes too late. (Smith v. Young, 11 Bush, 375.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

In the years 1851-'2-'3 the Northern Bank of Kentucky recovered judgments against appellant, W. H. Fitzpatrick, and others, in the Floyd circuit court, on which executions were issued and levied upon his lands.

And at their sale Richard Apperson, jr., as attorney for the bank, became the purchaser.

Five of the parcels so sold were redeemed by Fitzpatrick, and as to the other tracts, after the time for redemption under the statute had expired, the bank, through Apperson as its attorney, on the 10th of May, 1858, received from Fitzpatrick three hundred dollars on its claims embraced by the judgments. And again, on December 16th, 1866, he paid to Apperson two hundred dollars on the bank's claims against him.

In October, 1875, Apperson having become, in some way unexplained by the record, the owner of the unpaid portion of the indebtedness of Fitzpatrick to the bank, they made a settlement, and counted the interest at the rate of ten per cent. per annum from the respective dates at which the several claims of the bank were originally due, and the appellants, W. H. and H. C. Fitzpatrick, jointly executed to Apperson five promissory notes for five hundred dollars each, payable in six, twelve, eighteen, twenty-four, and thirty months, with ten per cent. interest from date of the first, and a like rate from the date until paid of the others.

A mistake, by embracing in the calculation one of the original debts to the bank that had been paid, was discov-

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ered after the settlement, but it was promptly and willingly corrected by Apperson.

The evidence shows that a man by the name of Gearhart was bound upon the original indebtedness to the bank, and that he did not execute either of the above-mentioned notes.

Suit was instituted on them by the appellee as executrix of Apperson, and the appellants pleaded that the notes contained usury exceeding the sum of nine hundred dollars.

Judgment, from which they have appealed, was rendered against them for the amount of the notes and ten per cent. interest, subject to some uncontroverted credits.

From the facts, it is evident the notes contain unlawful interest, unless some reason can be shown in avoidance of appellants' plea.

It is claimed for the appellee that the ten per cent. interest counted by her testator, and included in the notes, was not illegal—

First. Because they were given in consideration of the right to redeem appellants' lands, and the interest was a part of the price of them.

Second. If the interest was illegal when it was agreed to be paid, it is not so now, because the change of the payee and omission of Gearhart's name and substitution of H. C. Fitzpatrick's was a novation that operated as a payment and discharge of the original debts, and that limitation, which she pleads, began to run from the novation, and appellants' claim is therefore barred.

It is true that a sale of a right to redeem the lands, after the expiration of the time within which appellant W. H. Fitzpatrick could have redeemed without the consent of the owner of the debts, would have been a sufficient consideration to support the promise to pay ten per cent., had it

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constituted a part of the price to redeem. Yet the acceptance of the sums paid by Fitzpatrick in 1858 and 1866 on the original indebtedness or judgments was a waiver on the part of the bank of its right to demand a deed for the lands previously sold to pay that indebtedness or those judgments, and a notice to him that it would not insist upon its right to refuse redemption.

The bank and its assignee, by the acceptance of those payments, are estopped to demand a deed or deny the appellants' right to redeem the lands which he occupied without disturbance or notice of such a claim until the institution of this action. The notes were executed more than fifteen years after the acceptance of the \$300 in redemption *pro tanto* of the lands, and it does not appear that the payment of ten per cent. was imposed at that time or at any other, until the execution of the five notes to appellee's testator.

And unless the obligation to pay more than the legal rate of interest in consideration of the right to redeem lands sold under execution after the expiration of the statutory limit of redemption, and before a deed be made to the purchaser, be entered into at the time or prior to giving the right to redeem, it is nothing but a contract to pay interest on a pre-existing liability forborne to be enforced in consideration of the new promise to pay the interest, which is not in consideration of the right to redeem, but for the forbearance to collect the remainder of the original indebtedness after the right of redemption had been accorded, and therefore the excess beyond the legal rate of interest will be usurious.

To sustain appellee's second position, it must be shown, as in the case of *Smith v. Young, &c.*, 11 Bush, 393, that the

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usury was paid; then limitation would commence to run from the novation; but this has not been done.

The argument of counsel proceeds upon a misconception of the legal effect of the facts of that case.

The mere change of the payee or of a part of the obligors is not a payment of the usury, but it is the creation of a new contract, and discharges the obligors from the old obligation. And if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted.

In the case of *Rudd v. Planters' Bank of Kentucky*, MS. Opinion, May 26, 1880, it was held, "to the extent that usury is embraced in the debt, and so long as it can be traced, the new obligation given in discharge of the old indebtedness is without consideration."

None of the usury was paid by Fitzpatrick, according to the general acceptance of the term payment, but the whole of it was calculated as a part of the amounts of, and embraced in, the new notes; and it should have been taken out of them, and a judgment rendered for the remainder, with legal interest from the date the debts were originally due to the execution of the notes, and thence at the rate expressed in them.

Wherefore, the judgment is reversed, and cause remanded with directions to grant appellants a new trial, and for further proceedings consistent with this opinion.

The opinion herein is modified to this extent: that after deducting any usury that may exist in the notes, the interest for one year after the execution sales will be calculated at ten per cent., and after adding principal and interest together, interest at six per cent. will be computed on the result. (*Williams v. Williams*, 8 Bush, 255-'6.)

Elliott v. Elliott's adm'r.

CASE 55—EQUITY—FEBRUARY 26, 1881.

Elliott v. Elliott's adm'r.

APPEAL FROM GRAVES CIRCUIT COURT.

1. Oral evidence is competent to prove that notes due at a specified time were, by agreement, not to bear interest after maturity.
2. The evidence of the alleged agreement is not sufficient to establish it.

W. W. TICE FOR APPELLANT.

1. Although the law implies a contract to pay interest upon a note after its maturity, the presumption may be rebutted by verbal testimony. (*Butler v. Sudduth*, 6 T. B. Mon., 542; *Strader v. Lambeth*, 7 *Ib.*, 589.)
2. The proof of the agreement is ample.

W. M. SMITH FOR APPELLEE.

1. It is not competent to prove by oral evidence that no interest was to be charged upon the notes in controversy. It contradicts the writing.
2. The evidence, if competent, does not prove such an agreement.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellant was sued upon two notes for the purchase price of land, and a lien sought to be enforced. One of the notes is as follows:

"On or before the first of March next, I promise to pay B. B. Elliott the sum of two hundred and eighty-four dollars and twenty cents, for value received, this 22d November, 1873."

The other note is in the same form, and the same date, but made payable on the first of March, 1875.

To this action appellant pleaded payment, except as to the interest, and as to that, he pleaded an agreement entered into at the time of the execution of the notes with B. B. Elliott, to the effect that no interest was to be charged. On the issue as to the agreement in regard to the payment of interest, there being no allegation of fraud or mistake, oral

Elliott v. Elliott's adm'r.

evidence was heard, and the main question is as to the competency of such evidence.

The rule that parol evidence is not admissible to contradict or vary a written instrument evidencing an agreement is subject to many exceptions, and many instances have been declared within the rule which clearly do not belong there. The rule properly applied was intended to reach cases where the parties purport in the writing itself to set forth their agreement, or where the undertaking is inferable from the terms used in the writing. It ought not to apply to mere legal presumptions, which in effect add new terms to the contract as expressed between the parties, and it has not been so applied in this state. It is held, for instance, that one who signs a promissory note, the body of which denotes that all who execute it do so as principals, may show by parol that he signed as surety, and the other parties to the note are principals. In such a case the rule is encroached upon more directly than in the case under consideration. There the usual language in notes signed by more than one person, "we promise," followed by signatures without designation as to whether principals or sureties, would seem to import that all were equally bound, and stood in the same relation to the payee. Here there is an entire want of language to express, even by inference, an undertaking to pay interest. The undertaking is purely the offspring of legal presumption arising, not from the language or terms of the contract, but from the absence of language indicating such an intention. It has been held in this state, that while an indorsement in blank of a note implies an undertaking on the part of the indorser to pay in the event the maker does not, yet parol or extrinsic evidence is admissible to show that the assignment was without recourse. (*Butler v. Sud-*

Singer Manufacturing Co. v. Harned, &c.

duth, 6 T. B. Monroe, 543; Wharton on Evidence, sections 952 and 953; Parsons on Notes and Bills, volume 2, page 519.)

We are of the opinion that the evidence as to the agreement in regard to interest is competent.

The evidence, however, does not appear to clearly establish the existence of the agreement. The evidence principally relied upon to support the agreement is that of one witness, who states that "after the notes were executed, B. B. Elliott remarked that John thought he had charged him a large price for the land, and that he thought that the time upon which he let John have the land was quite a consideration; that he was to have his own time in which to pay for it, without interest." The notes were due in one and two years, and of course bore no interest until due; so that the term "without interest" may have applied to the time intervening before maturity. This evidence is rebutted by various statements of B. B. Elliott, tending to show that his understanding was that the notes bore interest. Under these circumstances, we do not feel authorized to disturb the judgment, and it is therefore affirmed.

CASE 56—EQUITY—FEBRUARY 26, 1881.

Singer Manufacturing Co. v. Harned, &c.

APPEAL FROM GRAVES CIRCUIT COURT.

1. The real estate of a *feme covert* will be subjected to the payment of a note executed by her for necessities for herself and the members of her family, even where the title to the property is acquired by the *feme sole* subsequent to the creation of the debt.
2. A sewing-machine held to be necessary for herself and family.

Singer Manufacturing Co. v. Harned, &c.

D. G. PARK AND HUGH RODMAN FOR APPELLANT.

The real estate of appellee, Mrs. Othelda Harned, is liable, under the statute, to satisfy a note executed by her for a sewing-machine. (Gen. Stat., sec. 3, art. 2, chap. 52; *Bergen v. Forsyth*, 17 B. Mon., 329; *Johnson v. Jones*, 12 *Ib.*, 329; *Pell v. Cole*, 2 Met., 253; *Monall v. Miller*, 3 *Ib.*, 333; *Harris v. Dale*, 5 Bush, 63; *Sharp v. Proctor*, 5 *Ib.*, 399; *Ford v. Teal*, 7 *Ib.*, 157; 9 B. Mon., 500; 1 Bush, 607.)

No brief for appellee.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

This is an action on a note executed by appellants, husband and wife, for a sewing-machine, in which it is sought to subject the interest of the wife in certain real estate. The real estate appears to have been purchased by the wife after the execution of the note, and it appears from the evidence that appellees are housekeepers, and that the wife had no general or separate estate at the time the machine was purchased, and that the husband was insolvent.

Section 2, article 2, chapter 52, of General Statutes provides that the real estate of a married woman shall be liable for such debts "contracted after marriage, on account of necessities for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her." The Revised Statutes, which were in force at the time the note was executed, contained the same provision, with the addition that the husband should also sign the writing evidencing the indebtedness.

Premising that a sewing-machine, on the facts of this case, properly comes under the head of necessities, there remains only the question as to whether the general estate of the wife acquired after the creation of such a debt can be subjected to its payment.

When a *feme covert* signs a writing evidencing a debt for which she might bind her separate or general estate, the pre-

Singer Manufacturing Co. v. Harned, &c.

sumption is that the writing was intended to bind such estate; otherwise, it is of no effect, as ordinarily she cannot contract, and it must be inferred that something was intended by entering into the agreement. So in this case it must be presumed that Mrs. Harned intended to assume some responsibility, and it is clear from the evidence of appellant's agent that credit was extended to her. Does the fact that she had no general estate at the instant the debt was contracted debar the creditor from pursuing such as she may thereafter have? The legislature has over the rights of married women in this respect absolute control. They may be given all the rights of a *feme sole*, or such rights may be given to them to be exercised in a limited degree; but in construing such acts, we must not lose sight of the object designed to be accomplished, and that object, if manifest, should to the fullest extent control construction. Here the object was clearly to enable the wife to supply the family with necessities, and as a means to that end she was empowered to use her real estate, not by giving a lien thereon, but by utilizing it as a basis of credit. Her power to contract for the purpose of obtaining necessities is that of a *feme sole*, with a restricted right to the creditor as to the estate he can subject to enforce the contract. Neither the letter nor the spirit of the statute seems to contemplate that the family shall go without the necessities of life because the estate of the wife is not in possession. There is no reason for thinking that the legislature intended to say that there might be an enforceable contract in the one case and not in the other. It is not contemplated that the *feme covert* thus dealing shall perpetrate a fraud by retaining her purchase, which is a necessity for the family, without paying for it.

Moore v. Estes.

It appears to us that the evidence shows an equitable title in Mrs. Harned to the lots mentioned in the pleadings that should be subjected to the payment of appellant's claim.

Judgment reversed, and cause remanded with directions for further proceedings.

CASE 57—EQUITY—FEBRUARY 26, 1881.

Moore v. Estes.

APPEAL FROM ESTILL CIRCUIT COURT:

1. In a suit against defendants upon a joint contract, one being resident the other a non-resident, a several judgment may be rendered against the resident served with process.
2. Although the court below erred in adjudging the costs against the non-resident to be paid by the resident defendant, the error is too insignificant to reverse upon it.

H. C. LILLY FOR APPELLANT.

1. The court erred in rendering any judgment for appellee. The proof does not authorize it.
2. If appellant was entitled to any judgment, it was against Moore & Mitchell as joint contractors.
3. The court erred in adjudging all the costs against appellant.

ISAAC N. CARDWELL FOR APPELLEE.

1. Mitchell being jointly bound with appellant, the action could have been prosecuted against either or both of them. (Civil Code, secs. 27, 369, 370.)
2. The case having been transferred to equity, the judgment should be treated as the verdict of a properly instructed jury, and will not be reversed, unless it is palpably against the evidence or manifestly not supported by it. (Pittsburg, &c., R. R. Co. v. Woolley, 12 Bush, 451; Judge v. Braswell, 13 *Ib.*, 67; Mulholland v. Samuels, 8 *Ib.*, 63.)
3. A new trial will not be granted upon the ground of newly discovered evidence, unless it be of such a permanent nature and unerring character as to preponderate greatly or have a decisive influence. (Respass v. McClanahan, Hardin, 345; Eccles v. Shackelford, 1 Litt., 35; Yancey v. Downes, 5 *Ib.*, 10; 3 Mon., 400.)

Moore v. Estes.

D. W. LINDSEY FOR APPELLER.

Appellee, under the pleadings, had the right to a judgment against appellant for his debt and the costs. (Gen. Stat., chap. 26, sec. 12; Civil Code, secs. 27, 369, 370.) No new trial should have been granted. (5 Bush, 473; 13 *Ib.*, 308; 1 Bibb, 143; 4 Bush, 410; 8 Dana, 16; 6 Bush, 85; 12 *Ib.*, 451.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The action was brought at law, and by consent transferred to equity. It presents legal issues alone, and therefore the judgment of the chancellor "will be treated as the verdict of a properly instructed jury," and as it is not palpably against the evidence, but to a very strong degree supported by it, the error assigned, that the judgment is contrary to the evidence, is not well taken. (P., C. & St. L. R. R. Co. v. Woolley, 12 Bush, 453; Judge, &c., v. Braswell, &c., 13 Bush, 67.)

One of the defendant partners was a non-resident, and no personal judgment was or could be rendered against him.

And it is insisted that a separate judgment against partners sued jointly cannot be rendered, and therefore the court erred in giving judgment against the appellant who was actually summoned.

The position results from a confusion of the facts of this case with the rule that a suit upon a joint promise will not be sustained by proof of a several undertaking. In a suit, however, upon a joint contract, which is sustained by the evidence, a several judgment may be rendered. (Secs. 26, 27, 373, Civil Code.)

And this court held, in the case of Williams v. Rogers, 14 Bush, 785, Judge Hines delivering the opinion, that the failure of the court to give judgment against one of several parties sued on a partnership undertaking, when all the par-

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ties were before the court, is not a reversible error available to one of the partners against whom judgment was rendered.

The judgment for the costs, which accrued against appellant in person, was proper, because the appellee succeeded on the merits against him. But the appellee had no right to a judgment against the appellant for the costs which accrued against the non-resident partner, because no personal judgment could be rendered against the latter; the appellee could have maintained a separate action against the appellant, and section 12, chapter 26, entitled "Costs," General Statutes, provides, that "if the plaintiff shall succeed against part of the defendants, and not against others," he shall recover his costs from the former only.

The costs against the non-resident amount to about \$6.50.

And the maxim "*de minimus non curat lex*" applies, as the accumulating interest before another judgment could be rendered, and the costs of a reversal would exceed many fold the error shown, and finally injure the appellant more than its correction would benefit him. (Broom's Legal Maxims; Caldwell v. Roberts, 1 Dana, 357; MS. Opinion, 1880.)

Wherefore, the judgment is affirmed.

CASE 58—MISDEMEANOR—FEBRUARY 5, 1881.

The Commonwealth v. Wheeler.

APPEAL FROM MADISON CIRCUIT COURT.

1. No penalty has been denounced against a person *not a merchant* for selling vinous or spirituous liquors when they are not drunk on the premises where sold, or adjacent thereto.
2. Before a person is required to obtain a license to sell whisky, he must be engaged in merchandising, and in the sale of other things than spirituous liquors.

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P. W. HARDIN, ATTORNEY GENERAL, AND C. J. BRONSTON FOR APPELLANT.

The word merchant is comprehensive. One who engages solely in the traffic or sale of liquors is a merchant. If this be not the case, a party who is in good faith a merchant must obtain license to sell, while a party who is not a merchant may sell as much whisky as he chooses without license, provided it is not drunk on his premises or adjacent thereto.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellee was indicted for merchandising liquor, the specification being that he sold one quart of whisky to Vincent & Warren without license authorizing him so to do. The evidence established that appellee was a farmer; that he kept a barrel of whisky at his residence for sale in small quantities; that he kept nothing else for sale; that he sold the whisky as charged in the indictment, and that he had no license therefor. On the conclusion of the evidence, the jury, under a peremptory instruction, found the accused not guilty. The commonwealth on this appeal questions the correctness of the ruling of the lower court in giving the instruction.

The ruling of the lower court was correct. By an unaccountable oversight of the law-making department of the government no penalty has been denounced against such selling of spirituous or vinous liquors when they are not drunk upon the premises where sold or adjacent thereto.

The third section of article 35 of chapter 29, General Statutes, provides, that one having no license therefor who shall sell, in any quantity, wine or spirituous liquors, or the mixture thereof, to be drunk in the house where sold or on adjacent premises, shall be fined in the sum of sixty dollars.

Section 6 of same article denounces a penalty of twenty dollars against any one who, without lawful authority, shall sell vinous or spirituous liquors in any quantity to be drunk

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at the place of sale, or on premises adjacent thereto, and which shall be so drunk.

Section 5 of article 3 of chapter 92 of General Statutes provides a penalty of sixty dollars to be paid by any tavern-keeper or merchant who shall sell spirituous liquors without having obtained license therefor.

Section 1 of article 2, chapter 106, of General Statutes, reads: "A merchant may sell at his store-house, to be taken off and drunk elsewhere than on his premises or adjacent thereto, any wine, spirituous liquors, or the mixture thereof, in any quantity not less than a quart. But before he shall so sell he shall obtain from the county court a license therefor."

Section 3 of article 2 of chapter 106, General Statutes, as amended, authorizes a distiller to sell spirits of his own manufacture at his residence in quantities not less than a quart.

It will be seen from these provisions of the statute that before one is required to obtain license to sell whisky he must be engaged in merchandising and the sale of other things than whisky or spirituous liquors, and as the right to sell spirituous liquors or any other article of consumption exists in every case where not forbidden by statute, it follows that such a sale as is here complained of, when the whisky sold is not drunk upon the premises or adjacent thereto, is not in violation of law.

Judgment affirmed.

Prewitt, &c., v. Wortham, &c.

CASE 59—EQUITY—FEBRUARY 19, 1881.

Prewitt, &c., v. Wortham, &c.

APPEAL FROM GRAYSON CIRCUIT COURT.

1. A mortgage executed to secure an account, without any covenant therein to pay, is a mere incident to the demand, and cannot stand upon the footing of a written obligation to pay a debt.
2. The demand is barred in five years.

JAS. S. WORTHAM FOR APPELLANT.

The mortgage contains no covenant to pay the demand, and is only a security for it. Clearly, appellees' claim is only an account, and is barred in five years.

G. W. STONE FOR APPELLEE.

No property that had been mortgaged was found. Burtle's claim, evidenced by the mortgage, stands upon the footing of a specialty.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

This is an action against heirs to sell the real estate of the ancestor to pay debts. One Burtle comes in by cross-petition, asserting a claim secured by mortgage on personal property, but the property having been consumed by the decedent, Burtle is permitted to assert claim as a general creditor. To this claim the five years' statute of limitation as to accounts and contracts not in writing was interposed. The mortgage was executed in 1861, and the claim against the estate asserted in 1874, less than fifteen years after execution of the mortgage, but more than five years after the date of the mortgage. In the absence of a written obligation to pay, the statute requires, in addition to the affidavit of the claimant, other evidence. In this case there is no proof of the claim except the affidavit of Burtle and the mortgage. This presents the question whether the mortgage is "a written contract" which may be enforced at any time within fifteen years from its execution, or whether the

79	287
106	504
79	287
106	808
79	287
120	269

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claim is based upon "a contract not in writing," and therefore barred within five years.

The mortgage recites that it is made to secure an indebtedness of two hundred dollars, without specifying how the indebtedness arose or how it is evidenced, and concludes: "The above obligation is such that if the said Prewitt shall well and truly pay the above-named two hundred dollars, then this obligation to be void."

The test of whether this is "a written contract" within the fifteen years' statute of limitations depends upon whether it could be declared on as a covenant to pay. If an action could be brought and recovery had upon the mortgage as a substantive agreement, the statute as to written contracts applies; but if it cannot be so declared upon and a recovery had, it comes within the five years' statute of "contracts not in writing," and the right of recovery is barred. The element wanting here is of a substantive promise to pay. Even in a petition upon a note there must be an allegation of a promise, notwithstanding the note declared upon contains an undertaking to pay.

A mortgage may be so drawn as to contain an independent agreement which absorbs the original contract, but in the usual form, a mortgage is simply a collateral undertaking and is a mere security for the debt. The rule in this state in reference to mortgages, whether on personal or real estate, is, that they are mere securities for the debt. No title passes to the mortgagee, and no right is acquired by the mortgagee, except as an incident to the debt. When the debt to secure which the mortgage was given is barred by statute, the incident goes with the principal, and the mortgage ceases to be enforceable. The learning upon this subject is well presented by Justice Sergeant in *Scott v. Field*, 7 Watts, 360.

(See also *Hall et al. v. Byrne et al.*, 1 Scammon, 140; *Culver v. Sisson*, 3 N. Y., 264.)

Frequently an action will lie upon an instrument in writing which is a mere acknowledgment of the debt, and in which there is no express promise to pay, when an action would not lie upon the same language contained in a mortgage. In the one case the writing is presumed to be given as evidence of an agreement to pay, because it can have no other effect, and would, if not so construed, be meaningless; but in the case of a mortgage, the language used is presumed to have been so used to effect the usual object of a mortgage, which is to put in lien property as security for a debt. In either case it is a question of intention as to whether the writing was designed to evidence a contract to pay money, or was only intended to give security for a debt. In *Kendal v. Talbot*, 2 Bibb, 614, the following language was held to be a covenant to pay four dollars per acre for five hundred acres of land, subject to a credit of eleven hundred dollars: "We purchased of William Kendal a tract of land, supposed to be 500 acres, at four dollars per acre, and have paid eleven hundred dollars." But such language used in a mortgage primarily designed to give security for a debt might receive quite a different construction. (See also *Metcalf's ex'r v. Poindexter's ex'r*, 4 Met., 52.)

The case of *Marryat v. Marryat*, 28 Beavan, 224, decided in 1860, is in point. The facts as stated by the reporter are: by indenture dated in 1852, and made between Marryat, the intestate, and Hallett, a creditor, which recited that Marryat was indebted to Hallett in the sum of £4,441, 7s. 1d., "as the said Marryat did thereby admit and acknowledge," and that Marryat was unable to pay it, and

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that Hallett had agreed to forbear enforcing payment, and that in consideration thereof Marryat had agreed to execute the assignment after mentioned, it was witnessed that Marryat assigned to Hallett certain property to which he was entitled under the wills of two relatives, upon trust to sell, and out of the money received to retain £4,441, 7s. 1d. and interest, and to stand possessed of the residue in trust for Marryat. *The deed contained no covenant for the payment of the debt*, but there were covenants for title and for further assurance.

The question was, whether Hallett was entitled to rank as a specialty creditor or as a mere simple contract creditor.

The Master of the Rolls uses this language: "The deed was executed not for the purpose of creating any covenant from Marryat, but for the purpose of giving a security for the simple contract debt." In speaking of *Courtney v. Taylor*, 7 Scott (N. S.), which he says is not distinguishable from this, it is said: "In that case nothing could be more clear than that the sole object was to give security for the amount of the debt, and that being the object of the deed, the court, though there was a recital expressly admitting and acknowledging the debt, said the object of the deed is to give this security, and not to alter in any other respect the liability of the parties, and therefore this recital creates no specialty." The conclusion was that no covenant existed.

We conclude that Burtle's mortgage was given merely as a security for the debt, and does not contain a covenant on which an action would lie, and that the debt is barred by the five years' statute.

The statute of limitations does not apply to the claim of Dr. Heston, but the affidavit to the claim does not conform

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to the law. The claimant in his affidavit uses the expression "just credits, set-offs, or discounts." In *Leach v. Kendall's adm'r*, 13 Bush, 424, we held that the use of the word *just* in that connection was fatal to the proof of the claim. That opinion gives the reasons for our conclusions, and we need not repeat them here.

Judgment reversed, and cause remanded with directions for further proceedings.

To a petition for rehearing—

JUDGE HINES DELIVERED THE FOLLOWING RESPONSE:

If it be conceded that the statute of limitations is not pleaded in such a way as to give appellants the benefit of it, our opinion that the judgment should be reversed as to the claim of Burtle is not altered. The evidence is not sufficient to support the claim as a subsisting liability. The mortgage being only an incident to the debt, amounts in evidence to nothing more than an oral declaration made by the decedent in 1861 that he was at that time indebted to Burtle, on account, the sum mentioned in the mortgage, and when considered in connection with the fact that no effort is made to account, for the disposition of the property covered by the mortgage, and no effort made to enforce the payment of the debt until more than thirteen years after the date of the mortgage, and until more than eight years after the claim would have been barred by limitation, there is clearly a failure of proof that the claim is a subsisting demand. The answer and exceptions of the guardian *ad litem* put in issue every fact necessary to be established to authorize a recovery; that is, the creation of the debt and that it has not been paid, and as this goes to the merits of the claim, the adults are as much entitled to shelter themselves behind it

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as the infants. (Leach v. Kendall's adm'r, 13 Bush, 426.) There is no proof of the debt except the mortgage, and that, under the circumstances of this case, is not sufficient.

Petition overruled.

CASE 60—BAIL-BOND—FEBRUARY 15, 1881.

Walker & Hubbard v. The Commonwealth.

APPEAL FROM OHIO CRIMINAL COURT.

1. The verbal statement of the judge as to the effect of the failure of the grand jury to indict the accused at the first term has no legal significance.
2. Accused failed to appear at the first term in discharge of the bail-bond, and under the 93d section, Criminal Code, it was the duty of the court to direct that the fact be entered of record, and thereupon his bond was, as a matter of law, forfeited.
3. His trial and conviction afterwards did not affect the forfeiture of the bond.

WALKER & HUBBARD FOR APPELLANT.

1. The indictment should have been quashed. (Gen. Stat., 712, 896.) It was error to render judgment on the bail-bond. It was discharged by the failure of the grand jury to indict accused at the first term of court after its execution.
2. The bond was forfeited before trial, and judgment rendered thereon afterwards. In a misdemeanor accused can appear by counsel. (9 Dana, 304; 1 Duv., 26; 3 *Ib.*, 84; 1 *Ib.*, 244; *Ib.*, 235.)

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The accused was arrested, tried, and held to bail for a misdemeanor, and executed bond before the examining court, with appellants as his sureties, for his appearance at the next term thereafter in the criminal court, which came in October, 1876.

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No indictment was found at that term, and the court, on motion of the commonwealth's attorney, made during the term, after inspection of the minutes of the examining court and the proceedings of the grand jury thereon, and allowing the county judge before whom the bond was taken to attest it, ordered the charge to be again submitted to another grand jury, and that the accused stand upon his bail given before the examining court.

The accused did not surrender himself to the custody of the court, nor does it appear where he was during any part of that term, or that his sureties made any effort to have the court to take charge of him.

They claim the judge verbally stated to them, upon the failure of the grand jury to indict the accused, that they were released from responsibility on the bond; but there is no order of court exonerating them from the bail.

At the succeeding April term the accused was indicted, and the prosecution set for hearing on a day during the term. It was called upon the day fixed for trial, and the accused failing to appear, his bond was forfeited.

The appellants having been summoned to answer the forfeiture at the following term, moved that the accused be tried before the disposition of the summons against them on the forfeiture.

Their motion was sustained, and the accused, only appearing by attorney, was tried and convicted.

Subsequent thereto a judgment was rendered on the forfeiture against appellants, who prosecute this appeal for its reversal.

The verbal statement made by the judge amounts to no more than an expression of his belief of the effect of the failure of the grand jury to indict the accused at the first

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term, or of an intention to exonerate the appellants if a motion to re-submit the case had not been made.

This certainly worked them no harm, as they do not pretend that the accused had complied with his obligation to be present, or that they acted upon the statement of the judge, and caused the accused to depart or to fail to appear, or placed him beyond their control.

It is, however, earnestly insisted that the court cannot forfeit the bond of a person accused of misdemeanor until after trial and conviction, because the presence of the accused at the trial is not necessary, as it may take place in his absence, and in such case his attorneys may plead for him.

We do not agree with this construction of the law governing the question, which is to be found in section 88 of Myers' Criminal Code, and section 93 of the Criminal Code of 1877, in this language:

"If the defendant fail to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct the fact to be entered on the record, and thereupon the bail-bond, or the money deposited in lieu of bail, is forfeited."

The conditions of the bond of the accused, which conforms to the Code, are, that he should appear at the first term of the Ohio criminal court after his examining trial, to answer the charge, and to render himself amenable to the orders and process of the court in the prosecution of the charge against him; and if convicted, render himself in execution thereof.

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The accused has not complied with a single condition of his bail-bond, and for his failure to perform any of its conditions his sureties became bound for its amount.

He did not appear at the first term of the criminal court.

When the time for hearing the trial came, the court ordered the accused to be called into its presence to stand his trial; but he failed to appear, although his presence in court was lawfully required.

And when he thus failed to appear for trial, the section of the Code quoted made it the court's duty to direct the fact to be entered on the record, and thereupon his bail was, as matter of law, forfeited.

Wherefore the judgment is affirmed.

Petition for rehearing overruled.

CASE 61—EQUITY—MARCH 2, 1881.

Gates v. Barrett, &c.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. In general, movable property is to be assessed for taxation in the county of the owner's residence, and, having been assessed there, it is not assessable in another county.
2. A court of equity has power to restrain the collection of an illegal tax.
3. In granting injunctions, courts of equity are not confined to the grounds specified in the Civil Code.
4. Where the collection of an illegal tax is restrained, a judgment against the officer for the cost of the proceeding is proper, although he may have acted in perfect good faith.

OWEN & ELLIS FOR APPELLANT.

1. An injunction can be granted only on some one of the grounds specified in the Civil Code, and therefore cannot be granted to restrain the collection of an illegal tax.

82	295
84	510
86	500

79	295
107	418
79	295
116	954

79	295
116	954
79	295
118	138

79	295
d122	584

79	295
132	743

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2. The proof fails to show clearly that the property has been listed in another county.
3. As the sheriff acted in an official capacity, no judgment for cost should have been rendered against him.

W. N. SWEENEY & SON FOR APPELLEES.

1. Personal property should be listed for taxation where the owner may reside, if he be a resident of the state; and having been listed there, it cannot be listed in another county.
2. The collection of an illegal tax may be enjoined. (L. & N. R. R. Co. v. Warren County Court, 5 Bush, 247.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellees, residing in Henderson county, were assessed in Daviess county on the sum of \$20,000 employed by them in the last named county in the purchase of tobacco. The sheriff of Daviess proceeding to collect the tax was enjoined on the petition of appellees, which alleged that the assessment was illegal, because they had listed the same in Henderson county under the head of equalization, and that they would be compelled to pay the tax twice if the sheriff of Daviess was permitted to enforce its collection. From a decree perpetuating the injunction this appeal is taken.

The assessment was proper in the county of appellees' residence, and having been there made, the property is not subject to re-assessment in another county. In general, movable property is to be assessed for taxation at the place of the owner's residence.

The right to have an injunction to restrain the collection of an illegal tax has been so long recognized and acted upon in this state that it is unnecessary to stop to inquire upon what ground that jurisdiction is exercised by courts of equity. The jurisdiction in this case, however, may be placed upon the ground of the inadequacy of the remedy at law. The officer acting in good faith and under the color of right is justified by his process, and is not liable as a

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trespasser; and as a suit would not lie against the state directly, the only complete remedy is by injunction. But if there was a possible remedy at law against the public officer, it would not be sufficient to deprive the party of relief in equity. (High on Injunctions, sections 796 and 801.)

We do not agree with counsel that the only grounds upon which courts of equity may grant injunctions are specified in the Civil Code. The provisions of the Code upon this subject were not intended to take away other well recognized grounds of equity jurisdiction, which may be found necessary for the proper and full administration of justice.

It may be that as the sheriff was acting in good faith under color of legal authority, and is therefore not liable as a trespasser, he would not be liable for costs, if there were no statute upon the subject; but as section 13 of chapter 26, General Statutes, provides that a party succeeding in an action in equity shall recover his cost against any one who is not a nominal defendant, the judgment for cost is not erroneous.

Judgment affirmed.

CASE 62—EQUITY—MARCH 5, 1881.

Holmes v. Self, &c.

APPEAL FROM CALDWELL CIRCUIT COURT.

1. In a contest between ~~heirs~~, the use to which land bought by a partnership is applied does not necessarily determine the question as to whether it is to be treated as real or personal estate.
2. The test is the intention with which the purchase is made.

Holmes v. Self, &c.

F. W. DARBY FOR APPELLANT.

1. When the partner died, the partnership was dissolved, and the title was vested in his heir.
2. In order that realty shall be regarded as partnership property for purposes of the partnership, it must be purchased with money of the partners; it must be purchased for partnership purposes, and it must be appropriated and used in the partnership business. (Bank of L. v. Hall & Long, 8 Bush, 876; Parsons on Part., 363; Cornwall v. Cornwall, 372; Lowe v. Lowe, 13 Bush, 634; Galbraith v. Gedge, 16 B. Mon., 633.)

WM. DARBY AND A. J. JAMES FOR APPELLEE.

A firm, as such, cannot own realty. The legal title is held by the members of the firm, and a trust results to the firm for all partnership purposes. This character of trust is only held to exist for some lawful purpose, and when the purpose is accomplished there is no power to carry it further. (Parsons on Part., 372; Gen. Stat., chap. 37, sec. 25; 7 Serg. & Rawle, 438; 23 Ala., 837; 11 Barb., 75; 74 Penn. Stat., 391; 15 Am. Rep., 553; Story on Part., note to sec. 93; 69 Penn., 122; 8 Am. Rep., 229; 10 Leigh, 406; 15 Gratt., 11; 7 Conn., 11; 1 Ohio, 535; 1 *Ib.*, 535; Galbreath v. Gedge, 16 B. Mon., 631; 5 Met., 577; *Ib.*, 582; *Ib.*, 537; 5 Ind., 403; 29 Mo., 236; 15 Georgia, 445; 2 Barb. Ch., 198; 9 Cal., 616; 15 Penn., 234; 98 Mass., 107; 20 Ohio, 448; 63 Ill., 540; 14 Florida, 565; 3 McLean, 27; 7 Vesey, 453; *Ib.*, 425; 1 Mylne & Keene, 649; 3 *Ib.*, 443; 7 Simmons, 271; 8 *Ib.*, 529; 8 Jurist, 994.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Mayes & Hunter, partners in merchandising, purchased with partnership funds a lot in the town of Princeton for the purpose of erecting thereon a business house, and to sell the remainder, or to build houses on it for rent. The firm erected a business house on a portion of the lot, a mill on another portion, and having sold a part, there remained a small lot unimproved. Subsequently they sold and conveyed to Holmes an undivided third interest in the whole property, after which the business of merchandising and milling was conducted by the new firm, Holmes being a full partner. The unimproved lot was not used by the firm for partnership purposes. After the dissolution of the firm by

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the death of Holmes, this action was brought by appellant, as heir of Holmes, to recover an undivided one third of the lot which was unimproved at the time of the dissolution of the firm. There are no debts of the partnership, and the only question presented by this appeal is as to whether, as between heirs, the lot is to be treated as realty or as personal estate.

In another action between the same parties in regard to the portion of the lot on which the business house was erected, this court held that it should be treated as personalty. The question raised here grows out of the fact that the lot in controversy *was not used for partnership purposes*. We are of the opinion that the *use* to which the property is applied does not necessarily determine the question as to whether it is to be treated as personal or real estate, but that it is the intention with which the purchase is made that is the controlling element. If it were otherwise, real estate purchased with partnership funds and for partnership purposes, would at one instant be personalty, and at another realty, depending upon the facility with which the use was executed. So it appears to us that the use to which the property is applied is only an evidence of the intention of the partners to make it personalty or realty, and if the intention to make it personalty is clearly manifested by the partners in the purchase, the fact that there is a non-user for partnership purposes will not recommit it into real estate. In this instance the whole of the property was purchased for partnership purposes, the primary object being to secure a lot for the erection of a store-house, and secondarily, to sell or improve and rent the remainder, as might be best for the interest of the partnership. Prior to this purchase Mayes & Hunter were partners in merchandising. By the

 Shawhan, &c., v. Zinn, &c.

purchase they became partners in the whole of the realty, just as they would have done if there had been no partnership in merchandising, and the property had been bought with partnership funds for the purpose of division and re-sale on joint account. Such a joint venture in real estate may constitute a partnership as well as a dealing in anything else, and such a venture converts the realty into personalty. (Darby v. Darby, 3 Drewery (English Chancery), 495; Lindley on Partnership, vol. 1, p. 670; Lowe v. Lowe, 13 Bush.)

Judgment affirmed.

 CASE 63—EQUITY—MARCH 5, 1881.

Shawhan, &c., v. Zinn, &c.

APPEAL FROM KENTON CIRCUIT COURT.

1. The president and directors of a corporation, having the power to institute an action, have the power to dismiss it.
2. In order to enable a stockholder to sue for the corporation, or his associate stockholders, where the rights of the corporation are involved, he must allege that the directors decline to sue, or refuse to permit him to sue in the name of the corporation, and the corporation must be a party plaintiff or defendant.
3. The failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer, but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court.
4. If the plaintiff fails to make the corporation a party, it is not proper for the court to require him to do so, and his action should be dismissed absolutely.

C. W. WEST FOR APPELLANT.

1. The railroad company had no power to make the compromise or dismiss the suit. A corporation possesses only those powers which its charter expressly confers or are incident to its existence. (Dartmouth College v. Woodward, 4 Wheat., 518; Beach v. Fulton Bank, 3 Wend., 583; Green's Brice's Ultra Vires, p. 29 and note.)

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2. Railroad corporations organized separately cannot merge and consolidate their interests without legislative authority. (*Clearwater v. Meredith*, 1 Wall., 25; *Kean v. Johnson*, 1 Stock., 401; *Black v. Del. & Rar. Canal Co.*, 9 C. E. Green, 455; *Lauman v. Lebanon Valley R. R. Co.*, 30 Penn. St., 46; *Green's Brice's Ultra Vires*, note, pages 358, &c.)
3. The directors of the company were the agents and trustees of the stockholders, and in making the compromise which they did they violated that trust.
4. A single stockholder may sue to protect his corporation and its rights when the directors fail to do so. (*Dodge v. Woolsey*, 18 Howard, 331.)
5. The failure to make the C. & L. R. R. Co. a party should have been taken advantage of by special demurrer, and if the controversy could not be determined without the corporation, the court should have caused it to be made a party, or dismissed the petition without prejudice. (*Myers' Code*, secs. 40 and 400.)

ON PETITION FOR REHEARING.

The C. & L. R. R. Co. being a necessary party, the court should have ordered it to be made a party, and if this was not done, should have dismissed the petition *without prejudice*. (*Stanton's Code*, secs. 40 and 400; *Bullitt's Code*, sec. 28; 5 Bush, 518; 2 Duv., 146; 15 B. M., 589; 3 Bush, 201; 17 B. M., 602, *Ib.*, 632.)

WM. LINDSAY FOR APPELLEES.

1. The railroad company, under the general power to contract and be contracted with, sue and be sued, had authority to make the contract of compromise.
2. The act of the corporation must be clearly in excess of its corporate powers before the court, at the instance of stockholders, will disregard it. (9 Bush, 578.)
3. The terms of the compromise are not set out in the petition, and the court will not look to the exhibit to see what they are. (1 Met. 430; 1 Duv., 35.)
4. The charge of fraud is not well made.
5. The failure of appellant to make the C. & L. R. R. Co. a party is fatal to his action.
6. A majority of the stockholders, by their failure to complain of the order of dismissal, have approved the action of the directors, and the court will not interfere. (*Foss v. Harbottle*, 2 Hare, 461; *Dudley v. High School*, 9 Bush, 578 and 579.)

W. P. D. BUSH FOR APPELLEES.

1. To enable the stockholder to sue, where the rights of the corporation are involved, the corporation must be made a party. (*Green's*

Shawhan, &c., v. Zinn, &c.

- Brice's *Ultra Vires*, 2d ed., p. 645, note (a), and authorities there cited; *Dudley v. Kentucky High School*, 9 Bush, 578.)
2. The absolute dismissal of appellant's petition does not bar a future action by him against proper parties. (*Freeman on Judgments*, secs. 263 to 269; *Myers' Code*, secs. 120, 121, 122, 123, and 400; *Williams v. Berry*, MS. Op., Dec., 1853, cited in note to sec. 400.)
 3. In the absence of the corporation, the court had no jurisdiction to grant the relief asked.

G. W. CRADDOCK FOR APPELLEE.

1. The directors of a corporation, having the power to sue, have also the power to dismiss absolutely, or compromise any suit they may bring, and the stockholders have no right to interfere. (*Green's Ultra Vires*, pp. 390 and 391, and notes.)
2. To authorize the intervention of the chancellor at the instance of a stockholder, the directors must have exceeded their authority. (*Dudley v. Ky. High School*, 9 Bush, 578.)
3. When the act of the directors is one which a general meeting of the stockholders may sanction, an action by some of the stockholders, on behalf of themselves and others, to impeach that act, cannot be sustained. (*Bagshaw v. Eastern Union Railway Co.*, 7 Hare, 114; 2 Mac. & G., 389; *Green's Ultra Vires*, p. 562.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

An action was pending in the Kenton chancery court between the Covington and Lexington Railroad Company as plaintiffs and Bowler's heirs and others, defendants, involving the right of Bowler's heirs to hold the road as purchasers at a decretal sale, subjecting the road to the payment of a large sum of money secured by mortgage, and sold at the instance of the mortgagees under a petition in equity filed in the Fayette circuit court. The right of the parties was finally determined on an appeal to this court, in an opinion holding that the purchase inured to the benefit of the Covington and Lexington Railroad Company, and a mandate issued directing certain proceedings to be had in the court below. After this opinion was delivered, on a petition for a rehearing filed, in which it appeared that the heirs of Bowler were not all before the court, the mandate or opinion

was modified, and the heirs of Bowler are permitted to make defense, and if no proper defense was interposed, the judgment directed to be entered as required by the original opinion. The parties who purchased under the sale of the Fayette court had organized a new corporation known as the Kentucky Central Railroad Company.

After the return of the cause from this court, the president, directors, and company of the Covington and Lexington Railroad Company (the old corporation) entered into a compromise with the new corporation, or the purchasers of the road, by which the action for its recovery by the old corporation was dismissed and the stock transferred by the agreement to the new corporation, thereby leaving the *purchasers* at the decretal sale the owners of the road. Whether the president and directors, or a majority of them, were authorized to make the agreement at a meeting of the stockholders does not appear, and whether such power could have been conferred is not material to inquire; it is evident, however, that where the franchise has already been sold, the power of the president and directors to compromise with the *purchasers* in a controversy involving the validity of the sale would not be controlled by the well established rule that the directors of a corporation have no power to destroy its corporate existence. The appellant in the present case alleges that he is a stockholder, and that the board, or a majority of them, combining with the defendants in the original action for the purpose of defrauding the stockholders, entered into the compromise by which the action for the recovery of the road was dismissed, and all its rights and franchises transferred to the new corporation, thereby destroying not only the existence of the old corporation, but rendering the stock of the appellant valueless. He

asks that the action dismissed by the directors be reinstated on the docket, and that he be permitted to prosecute the action, and that the compromise agreement be disregarded.

It is plain that the president and directors of the old company, having the right to institute the action, had the power to dismiss it, and certainly one out of many stockholders, suing not in the name of or for the corporation, will not be permitted to prosecute the action in his own name against the will and consent of the directors. A stockholder may sue for the corporation or his associate stockholders where the rights of the corporation are involved, and the directors decline to sue or refuse to permit the stockholder to prosecute the action in the name of the corporation. Such facts must be alleged, and the corporation must be a party plaintiff or defendant; and this is indispensable, because, as said in the case of *Davenport v. Davis*, 18 Wallace, "the relief is asked in behalf of the corporation and not the individual share-holder." There is no allegation that the directors decline to reinstate the case on the docket, or that any demand was ever made of them or either of them by the stockholder bringing this action, or any parties in interest to continue its prosecution, nor is the corporation, the Covington and Lexington Railroad Company, a party to the action, and its prosecution, therefore, by the stockholder, would be no bar to a subsequent action by the corporation.

This is not merely a defect of parties (the failure to bring the corporation before the court) to be taken advantage of by special demurrer, but the omission to make the corporation either a plaintiff or defendant leaves the stockholder without a cause of action; in other words, the party entitled to the relief is not before the court. The stock of the stockholder in the old corporation, or his rights under it, cannot

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be affected if the directors had no power to make the compromise; but that is a different question from the relief sought here, namely, that the stockholder may institute and prosecute the action in his own name. We have the stockholder asserting this right, and the president and directors in court asking its dismissal, and the court very properly sustained the demurrer. "*It is submitted* that such a suit would be defective, and that in every case where the question, whether of *ultra vires* or of fraud, is one which concerns the corporation itself, the corporation must be a party either as plaintiff or defendant. A decision in the absence of the corporation would be a decision affecting the rights and liabilities of an individual not before and not heard by the court." (Green's Brice's *Ultra Vires*, page 571.) If this stockholder can institute an action in his own name and for his own benefit, every other stockholder may bring a like action, and therefore the necessity of having the party entitled to the relief before the court, and if no such party appears, a demurrer should be sustained.

It was not necessary or proper for the court below to dismiss the action without prejudice, as it cannot affect the rights of any of the parties, nor was it proper for the court to require the appellant to bring the corporation before the court. This was the appellant's duty, as in the absence of the corporation no relief could have been granted. Many other questions have been raised on the appeal as to the sufficiency of the petition. These questions have not been considered. For the reasons already indicated, the demurrer was properly sustained.

 Perkins v. The Auditor. Pope v. Same.

CASE 64—ORDINARY—MARCH 12, 1881.

Perkins v. The Auditor. Pope v. Same.

APPEALS FROM FRANKLIN CIRCUIT COURT.

The general assembly has no power to reduce the salary of the judges of criminal courts nor of the vice chancellor of the Louisville chancery court before their terms of office expire, and the act of the general assembly, entitled "An act to amend chapter 95 of General Statutes, title 'Salaries,'" approved April 13, 1880, so attempting to reduce their salaries, is unconstitutional.

STEVENSON & O'HARA FOR APPELLANT PERKINS.

1. It is not in the power of the legislature to diminish the salary of the judge of the criminal court for the twelfth judicial district during the continuance of his term of office. (Constitution, art. 4, sec. 25; *Ib.*, art. 18, sec. 13.)
2. This court, in *Adams v. The Auditor* (13 B. Mon., 150), held that the legislature had no power to deduct from the salary of a circuit judge, except under the thirteenth section, article eight, referred to, for neglect of official duty. (*Nuttall v. Garrard*, 2 Met., 106; *Cochran v. The Auditor*, 9 Bush, 8.)

BEATTIE & WINCHESTER FOR APPELLANT POPE.

1. The act of April 3, 1880, is void, because it attempts, without any neglect of duty on his part, to diminish, during the time for which he was elected, the compensation of the vice chancellor, fixed by law, in contravention of sec. 25, art. 4, and sec. 13 of the constitution.
2. Appellant's compensation is fixed by sec. 776 of the Civil Code of Practice. (*Auditor v. Adams*, 13 B. Mon., 150; 2 Met., 106.)

W. LINDSAY, FOR APPELLANT POPE.

1. The compensation of the vice chancellor is fixed by section 776 of the Civil Code of Practice. The act of April 13, 1880, does not repeal the section referred to, nor in any way affect it. (*Chiles v. Monroe*, 4 Met., 75; *Jones v. Thompson*, 12 Bush, 394; *Rushing v. Sebre*, *Ib.*, 199.)
2. The act of April 13, 1880, is unconstitutional, because it attempts to reduce the salary of the vice chancellor during the continuance of his term of office. (*Auditor v. Cochran*, 9 Bush, 9.)

Perkins v. The Auditor. Pope v. Same.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

These cases were heard together, and as the law of the one is the law of the other, this opinion will apply to both.

In the case of Geo. G. Perkins it appears that he was in 1878 elected criminal judge in the twelfth judicial district for the term of six years, and at the time of the election and qualification in office the salary fixed by law and payable out of the public treasury was three thousand dollars per annum.

In the case of Alfred T. Pope, he was elected in 1878, for the term of six years, vice chancellor of the Louisville chancery court, at which time the salary fixed and payable out of the public treasury was three thousand dollars per annum.

On the 13th of April, 1880, the legislature passed an act reducing the salary of each to twenty-four hundred dollars, and on the refusal of the Auditor to pay more than the twenty-four hundred dollars from the time this act went into effect, a mandamus was applied for to compel the payment of the salaries at the rate of three thousand dollars per annum, and on the refusal of the court below to grant it, an appeal was in each case taken to this court.

The question presented is as to the constitutionality of the act of April 13, 1880, so far as it applies to judges whose term of office had not then expired.

The determination of this question depends upon the construction of section 13 of article 8 of the constitution of this state, which is as follows:

“It shall be the duty of the General Assembly to regulate, by law, in what cases, and what deductions from the salaries of public officers shall be made, for neglect of duty in their official capacity.”

Perkins v. The Auditor. Pope v. Same.

The inquiry is, first, are appellants "public officers" within the meaning of this provision? and secondly, if they are "public officers," does the section quoted restrict the power of the legislature in the reduction of salaries to cases where there has been a neglect of duty?

That appellants are embraced in the term "public officers," we think is perfectly clear.

The jurisdiction exercised by each of these courts is a part of that belonging at the time of the adoption of the constitution to the circuit courts, and the authority to create them is conferred by section 1 of article 4, which provides that the judicial power of the commonwealth shall be vested in the Court of Appeals, the courts established by the constitution, and such inferior courts as the general assembly may establish. Circuit courts are established by the constitution, and it is expressly provided that the salaries of the judges thereof, as well as the salaries of the judges of the Court of Appeals, shall not be diminished during the time for which they were elected; and but for the provision above quoted, there would have existed no authority in the legislature to reduce the salaries of the circuit or appellate judges for any cause.

These provisions in regard to the salaries of the judges of the Court of Appeals, and of circuit judges, and that restricting the power of the legislature in the reduction of the salaries of public officers to cases where there has been a neglect of duty, was evidently intended to place the administration of justice above and beyond the influence of the prejudice or passions of the hour, the wisdom of which was demonstrated in the contest between "The Old" and "The New Court," which was terminated in 1826.

Perkins v. The Auditor. Pope v. Same.

The legislature having, under express authority contained in the constitution, created these courts with a jurisdiction not inferior, except in extent, to that exercised by the circuit courts, and being in fact an essential part of such jurisdiction existing at the time the constitution was adopted, there appears no reason why the safeguards thrown around the circuit courts should not also present a barrier to legislative interference with the salaries of the judges of such courts. Such judges are, in every essential, as much "public officers" as the judges of the circuit courts. They are chosen by the people as circuit judges are chosen; they exercise in dignity the same jurisdiction, and are paid in the same way out of the public treasury.

We are not to be understood as saying that the judges of such courts are circuit judges within the full meaning of the terms of the constitution, because in that case we would be compelled to hold, that when the courts were once established, there was no power in the legislature to abolish them. The power to abolish does not always, and of necessity, include the power to modify. Whether the one includes the other is a question of intention to be determined from a consideration of the whole instrument under which the power is exercised.

A cognate matter was determined by this court in Auditor v. Cochran, 11 Bush, 7. In that case there was an act of the legislature directing that a chancellor *pro tem.* of the Louisville chancery court should be paid out of the salary of the chancellor without regard to the cause of the failure of the chancellor to preside; and notwithstanding the constitution expressly authorized the legislature to repeal the court, it was held that there could be no deduction from the

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salary of the chancellor, unless for neglect of duty as specified in section 13, article 8, of the constitution.

The term "public officers" does not apply to any officers except those who are paid a salary out of the public treasury. It has no reference to cases where the compensation of the officer is derived from the fees of his office, nor to any salary not paid out of the public treasury.

The next inquiry is: Does the fact that the constitution provides that the salaries of "public officers" may be diminished for neglect of duty take away, by implication, the power to diminish for any other reason?

We think it does. If that section of the constitution does not operate as a restriction, it is without meaning, for, in its absence, the legislature would have the power to reduce the salaries of all public officers, except appellate and circuit judges, for any cause, which cannot be done, as we have seen in the case of *The Auditor v. Cochran*. Judge Cooley, in his *Constitutional Limitations*, page 78, has expressed the rule as follows:

"When the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference, to add to the condition, or to extend the penalty to other cases.

This is a familiar principle that is recognized in many decisions of this court construing our constitution, among which may be mentioned, *The Auditor v. Adams*, 13 B. M., 150; *Brown v. Grover*, 6 Bush, 1; *Robinson v. Swope*, 12 Bush, 21; *Williams v. Commonwealth*, MS. Opin., 1880.

Judgment reversed, and cause remanded with directions to issue the mandamus in each case.

Murrell's adm'r v. McAllister.

CASE 65—EQUITY—MARCH 19, 1881.

Murrell's adm'r v. McAllister.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

1. There is a manifest distinction between permitting a receiver to collect a judgment already rendered, and conferring upon him the right to institute an action in which he has no interest, for the purpose of recovering a judgment for the benefit of others. The parties in interest must sue.
2. It is as necessary to state a cause of action as to sustain it by proof. The absence of either prevents a recovery.
3. The action against appellant is barred by the statute of limitations.

GEO. W. WILLIAMS AND E. H. BROWN FOR APPELLANT.

1. The court erred in substituting appellee as plaintiff, instead of the original plaintiffs in the action.
2. The Civil Code has specifically prescribed who shall be parties to actions. Appellee, as receiver, cannot institute an original action, to the exclusion of the real parties in interest.
3. The action is barred by limitation. (1 R. S., 424, sec. 12; *Ib.*, 507, sec. 25; Morehead & Brown St., 668; 1 Greenleaf, sec. 79.)
4. The judgment is not supported by the evidence.

VANCE & MERRITT AND MALCOLM YEAMAN FOR APPELLEES.

1. The claims of all the parties, and all the claims in this suit, were merged in the judgment in favor of the receiver, and it was proper that he be made the plaintiff for its enforcement.
2. Appellants filed no exceptions to the commissioner's report. (*Slaughter v. Slaughter*, 8 B. Mon., 483; *Campbell v. Weakley*, 7 B. Mon., 24; *Daniels' Ch'y Prac.*, 1, 592; 9 Pick., 73; 3 John. Ch. Rep., 81; 6 *Ib.*, 592; 13 Peters, 359; *Taylor v. Young*, 2 Bush, 431; 1 Mar., 349; 3 *Ib.*, 66; 7 J. J. Mar., 503.)
3. The action is not barred by limitation. It is not shown that any of the distributees were of full age five years before the action was instituted. (*Hayden v. Hayden*, 3 Met., 191; *Rev. Stat.*, chap. 97, sec. 15; *Ib.*, vol. 2, 435, chap. 106, sec. 27; *Moore v. Tanner*, 5 Mon., 46; 10 Bush, 261; 15 A. L. R., N. S., 212.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

On the 28th of November, in the year 1864, Josiah Veach qualified in the county court of Henderson as administrator of Charles Winfrey, deceased, and executed a bond of that

79	311
90	304
79	311
101	102
79	311
114	301
114	306

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date with W. D. Stirman, Benj. Stout, H. C. Elliott, and Henry Dugan, his sureties. Lewis Griffin, Mary Griffin, Charles H. Winfrey, and others, claiming to be collateral heirs of the *intestate*, instituted an action in equity on the 27th of June, 1867, against Veach, the administrator; and Martin Vanada and others, who were alleged also to be heirs, and some of them unknown, praying a settlement of the accounts of the administrator and a distribution of the personalty between the heirs, and a division of the land. The sureties were not parties to this original action, and on the 29th of December, 1869, judgment was obtained against Veach, the administrator, for \$15,405.84, amount of assets that came to his hands, and as some of the heirs or distributees were unknown, a receiver was appointed (John E. McAllister), and the judgment for the amount entered in the receiver's name, that he might collect and hold it subject to the order of the court. Veach, the administrator, appealed from the judgment against him, and it was reversed, the amount being reduced to \$14,171, and a judgment for that sum was entered in the name of McAllister, receiver, when the case returned to the lower court. It seems that when the original judgment was rendered that the case was still in the hands of the commissioner to report other assets unaccounted for and not embraced in the judgment rendered. In October, 1872 (15th) the plaintiffs filed in the clerk's office an amended petition, in which they alleged the recovery against Veach as directed by this court; that Henry Dugan was one of his sureties, but is dead, and that one Sallie Murrell was his heir and devisee, and prayed judgment against her for the recovery of the \$14,171, and any other sum that might be found due. A judgment was rendered on this amended petition against

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Mrs. Murrell for the above-named sum, and also a judgment against both herself and Veach for the additional sum of \$5,871.

Mrs. Murrell died shortly after the judgment, and her administrator brought the case to this court on an appeal, and it was reversed as to her and remanded.

The judgment was reversed on the appeal of Mrs. Murrell on the ground that the amended petition filed in vacation was in the name of the heirs of Winfrey, or a portion of them, to enforce a judgment against her as the devisee of Dugan, who was the surety of Veach, when that judgment was in the name of McAllister, the receiver; that the receiver must prosecute the action to enforce that judgment and not the heirs, and that as to the judgment for \$5,871 for funds not embraced by the original judgment, no recovery could be had against the sureties until all the parties in interest were before the court. On the return of the cause the receiver, McAllister, was substituted, at his own instance, against the objections of the appellants, to the rights of the heirs of Winfrey, and was permitted to prosecute the action not only for the judgment obtained, but for the purpose of a final settlement. This was done, and it seems to us conferred a right of action on a party who was a stranger to the recovery of the \$5,871 judgment, and had no interest whatever in it. There is a manifest distinction in permitting a receiver to collect a judgment already rendered and conferring on him the right to institute an action in which he has no interest, for the purpose of recovering a judgment. The parties were *sui juris*. They had not asked the court to appoint the receiver to bring the action, and could not have conferred such a right even on petition. He did not ask to be permitted to sue in his name for all the heirs, and if he

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had, there is no reason why the heirs could not sue. They are not so numerous as that an action is required to be brought in the name of another for their use, nor is there any reason assigned why the receiver should be permitted to prosecute an action against the surety by reason of a devastavit committed by the administrator. The receiver might unite with them in the action, as the first judgment is in his name, if necessary to a settlement of the estate. If he can sue for all the parties in interest, it is because of the twenty-fifth section of the Code that provides: "If the question involved a common or general interest of many persons, or if the parties be numerous, and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all." We think this case is not embraced by the section quoted; but even if the right to sue in the name of the receiver is conceded, the pleading seeking a recovery fails to state a cause of action. This action is against the administrators of Mrs. Murrell, who was the heir and devisee of Dugan, who was the surety of Veach. There is no allegation in the amended petition filed by the heirs, or the amended petition filed by McAllister as receiver, that Mrs. Murrell as heir or devisee of her father received a dollar of assets from his estate. It is alleged that one Harris, as curator of Dugan's estate, has money enough in his hands to pay the debt claimed, but this is not an averment that Mrs. Murrell or her administrators received it, or are in any manner liable therefor. There was a demurrer to the amended petition by Mrs. Murrell's administrators, and it should have been sustained. The judgment in this case is against the administrators of Mrs. Murrell, to be levied of assets in their hands as such, and the result is that Mrs. Murrell's estate is made

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to pay the debt for which Dugan was liable as surety, when she had received nothing from her father for which she should be charged.

It may be said that the commissioner's report and proof show that she received some estate, but this testimony is insufficient to support the judgment for want of the pleading. It is as necessary to state a cause of action as it is to sustain it by proof. The absence of either prevents a recovery. As this case must be again reversed, it is proper to notice another question raised by the pleadings below, and which must determine the rights of the parties as the record now stands. The administrators of Mrs. Murrell pleaded the five years' statute of limitation. That statute provides: "A surety for an executor, administrator, guardian, curator, or for a sheriff to whom a decedent's estate has been transferred, shall be discharged from all liability as such to a distributee, devisee, or ward when five years shall have elapsed without suit, after the accruing of the cause of action, and after the attaining of full age by the devisee, distributee, or ward, but the laches of one shall not affect the right of the other."

The statute quoted is found in the Revised Statutes, and the same provision is contained in substance in the General Statutes. (Section 3 of article 6, chapter 71, General Statutes, and section 13 of chapter 97, Revised Statutes.)

Veach administered on the 28th of November, 1864, and Dugan, the surety, died on the 23d of January, 1871; so, from the administration of Veach to the death of Dugan, was six years one month and twenty-six days; and when you deduct either the six months in which no action can be brought against an administrator, or the nine months in which he is allowed to distribute, the distributees, if adults

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at the accrual of the cause of action, are precluded by the statute from recovering, and the right to maintain the action depends now on the question as to whether they were twenty-one years of age when the cause of action accrued, or reached their majority within five years from the accrual of the cause of action to its institution. As to such of the distributees as are within the saving clause of the statute, the action, if properly brought, can be maintained.

The statute of 1838, under which the case of Hayden's adm'r v. Hayden, 3 Metcalfe, was decided, gave all the distributees the right to maintain the action within five years after the youngest of the distributees arrived at age; but under the present statute the infancy of one does not protect or save the rights of the other. The appellees insist that no action can be instituted against the personal representative for a settlement and distribution until two years have elapsed from his qualification. There is a provision contained in both the Revised and General Statutes, providing that "after the expiration of two years from the time he qualifies as such, the personal representative shall be presumed to have used the surplus assets in his hands, and shall be charged with interest from that time, unless he proves that he did not use it or make interest," &c. The only effect of this statute is to fix the liability of the personal representative for interest on the amount he has failed to pay over, and does not regulate the time at which he may be compelled to pay the principal. It is also made his duty to settle his accounts within two years after he qualifies; but this has never been held as exempting him from an action in equity for a settlement and distribution of the estate, and there is no reason why he should be permitted to retain for two years the principal of the estate, if it is in such a con-

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dition as will enable him to distribute. "No suit or action shall be brought against a personal representative until six months after he qualifies." (Volume 1, Revised Statutes, page 501, section 23.) "A personal representative may distribute the estate of a decedent nine months after his death." (Volume 1, Revised Statutes, page 424, section 12.) Prior to the adoption of the Revised Statutes, and when similar enactments existed with reference to settlements by personal representatives, this court, in the case of the Commonwealth for Bell v. Hammond, 10 B. Mon., decided that a suit may be commenced by a distributee for his share of the personal estate against the administrator at any time after the expiration of nine months from the grant of administration; and as he may settle after nine months under the section of the Revised Statutes referred to, we perceive no reason why the distributee could not have brought his action for distribution after that period, under the law as it existed when the Revised Statutes were in force; and as evidence of the manner in which these statutes have been and should be construed in adopting the General Statutes, an action to settle the estate of an intestate may be brought before six months expires from the date of his qualification. Sec. 23 of chap. 39, General Statutes, provides: "Six months must run after the date of the qualification of the first personal representative of a decedent's estate by a court of this commonwealth, before an action shall be commenced against any executor or administrator thereof, *except to settle the estate*, or against an executor *de son tort*." Whether under this section the statute would commence to run against the distributee from the time of the qualification of the personal representative is not necessary to determine, as this question must be determined

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by the Revised Statutes. The cause of action accrued, therefore, after the expiration of nine months from the qualification of Veach as administrator, as to such of the distributees as had reached their majority, and if they were adults, the statute ran before Dugan's death. It is argued by counsel for the appellees that the burden of proof is upon the appellants to establish the fact that these distributees were not under the disability of infancy when the alleged cause of action accrued. The general doctrine is, that one relying upon such a disability must prove its existence, as the fact being peculiarly within his own knowledge, can be easily established; that the burden should rest where the exclusive knowledge of the fact exists is a well recognized rule, but whether it is to apply in a case like this is not so certain.

The plea is, that the cause of action accrued more than five years before the bringing of the action, and five years after the distributees had attained the age of twenty-one years. Both facts must be established, else the defense fails; and if either one or the other does not constitute any part of the defense, it was not necessary to plead it. If the saving as to infancy, as counsel says, had been embodied in another section, the solution of the difficulty would be easy; but the saving and limitation are embraced within the same section, and, as was decided by this court in *Hayden v. Hayden*, 3 Metcalfe, the burden is on the party pleading the statute.

Then as to the proof, the original plaintiffs all sue as adults. There is no appearance of the plaintiffs, or any of them by their next friend, or any defense made by a statutory or guardian *ad litem*. In tracing the *heirship*, the testimony of witnesses advanced in years have necessarily

Thompson, &c., v. Pettibone.

been resorted to, and in giving their knowledge of the family and of the plaintiffs, or many of them, the conclusion is inevitable that they must have been of age when the action was instituted. It appears that the plaintiffs who claim as distributees are the children of the sons and daughters of James Winfrey, who was the common ancestor. The will of James Winfrey is dated in 1813, and the whole family history shows that these plaintiffs must have been of age when this action was instituted. Therefore, on the plea of the statute, as the record is now presented, the judgment should have been for the surety.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion, with leave to amend.

CASE 66—EQUITY—MARCH 19, 1881.**Thompson, &c., v. Pettibone.****APPEAL FROM MERCER CIRCUIT COURT.**

1. The chancellor has the power to direct the conversion of the property of an infant when her interest requires it, if it can be so done as not to change the nature of the property, nor its descendible quality.
2. In a case authorizing it, the court will order that the conversion be made under proper restrictions.

THOMPSON & THOMPSON FOR APPELLANTS.

The only objection to the judgment is, that the circuit court ordered the bonds to be refunded in bonds of the same state—North Carolina—a repudiating state.

P. B. THOMPSON FOR APPELLERS.

It is greatly to the interest of the infant that the bonds should be re-funded. The bonds now held are non-productive, while, if they are re-funded, all the infant's debts can be paid, and she will have, in addition, a considerable income.

Thompson, &c., v. Pettibone.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

May Pettibone, an infant, is the owner of eighty-nine bonds, of \$1,000 each, of the state of North Carolina. Her ancestor, who devised them to her, was indebted at her death \$1,134.58. No other property belonged to her except some jewelry, which was sold for \$365, and the proceeds paid to her creditors.

The infant has contracted debts to the amount of \$750 for board, clothing, &c., furnished by the executrix of the decedent. It appears that twenty of the bonds are worth eleven cents to the dollar, and they can be funded in other bonds of that state at the rate of fifteen per cent. on the dollar, bearing four per cent. interest. And that nineteen of them are worth nineteen cents to the dollar, and can be funded in other bonds of the state at the rate of twenty-five per cent. to the dollar, bearing four per cent. interest.

As to the remaining fifty bonds, they seem to have been repudiated by the state, and are worth but one and a half cents to the dollar.

The infant has no other property to pay her debts or to support herself with.

Her guardian applied to the chancellor for his sanction and permission to fund the thirty-nine bonds first mentioned, and for advice as to the proper disposition to be made of the fifty bonds apparently so valueless.

The chancellor directed that the thirty-nine should be funded, and the fifty remain without change or disposition. The creditors were made defendants, and all consented to the decree except Thompson & Thompson, who agree to the funding of the bonds, if the court has the power to direct them to be funded, but excepted to the judgment directing them to be funded, on the sole ground that the court has no power to do so.

Thompson, &c., v. Pettibone.

This is the only error assigned. Guardians will not ordinarily be permitted to change personal property into real property, or the latter into the former.

But guardians may, under particular circumstances, where it is manifestly for the benefit of the infant, change the nature of the estate.

“And the court would support their conduct, if the court would do it under the same circumstances. They cannot do it wantonly, but where it is manifestly for the convenience of the infant. The court keeps a strict hand over them to prevent partiality. But it is too hard to say that the court would not permit trustees or guardians to do it in any case where it is manifestly for the advantage or convenience of the infant.”

This was the language of the Lord Chancellor in *Inwood v. Twyne*, 1 Ambler, 419.

It is substantially said in *Pierson v. Shore*, 1 Atkyns, 480, that the act of a guardian, where it is reasonable and beneficial to the infant, will have the same consequence as if done by the infant at full age, but it will be otherwise if the act is wantonly done by the guardian without any real benefit to the infant.

It can hardly be doubted that courts of chancery have always had the power to direct the conversion of the property of an infant where it is for his benefit, if it can be so done as not to change the nature of the property or alter its descendible quality. (See *Ware v. Polhill*, 11 Ves., jr.)

Lord Eldon said, in *Phillips ex parte*, 19 Vesey, jr., that the court acts for an infant as a trustee, and works the change of his property for his benefit.

Under our statute, guardians have the power to sell personal estate of the ward, and, with leave of the court, may

Thompson, &c., v. Pettibone.

compound a debt or demand. (Secs. 5 and 6, art. 2, chap. 48, Gen. Stat.)

And certainly if these powers may be exercised, the chancellor has the power to authorize the funding of the bonds which are personal estate, in view of the facts which show that the guardian is not seeking to engage in an adventure; that the alteration sought will avoid a sacrifice of the bonds by their sale to pay the aforementioned debts, and be of great advantage and profit to the infant.

"From the hazard which guardians must otherwise run, it is common for them to ask the positive sanction of the court to any acts of this sort. And when the court directs any such change of property, it directs the new investment to be in trust for the benefit of those who would be entitled to it if it had remained in its original state." (Section 1357, Story's Eq.)

The conclusion we have reached is sustained by the case of *Singleton v. Love*, 1 Head (Tennessee), p. 362.

And while the doctrine is clearly laid down in *Moore v. Moore, &c.*, 12 B. M., 662, that the weight of authority is decidedly against the power of a guardian to convert his ward's real estate into personalty, or his personalty into realty, the authority cited in *Reeves' Domestic Relations*, 334, is approvingly quoted, and it concludes by saying, "that a guardian is so far subject to this rule that he cannot thus change the property of his ward *without the authority of a court of chancery.*"

From this it is to be inferred that this court in that case recognized the power to rest with the chancellor in a case attended by such circumstances of benefit and profit as we have indicated in the above expressions.

Wherefore, the judgment is affirmed.

 Wilkins v. Barnes, &c.

CASE 67—ORDINARY—1881.

Wilkins v. Barnes, &c.

APPEAL FROM WARREN CIRCUIT COURT.

1. Where a dedication of a highway is claimed to have been made to the public, reason and authority require that the acceptance of the dedication must have been made by the county court upon its records, or by such acts of control or recognition as will furnish a presumption of its existence.
2. Without an acceptance of a dedication by the constituted representative of the public in its organic capacity, it is ineffectual.

CLARK & GRIDER, J. H. & JOHN M. WILKINS, FOR APPELLANT.

If any dedication has ever been made to the public of the ground claimed as a highway, there is nothing to show that it ever was accepted by the constituted representative of the public, the county court. Without that acceptance of record in some definite form, the alleged dedication amounts to nothing. (*Elliott v. Treadway*, 10 B. Mon., 27; *Bowman v. Wickliffe*, 15 *Ib.*, 98; 8 *Grattan*, 636; *Gedge v. Commonwealth*, 9 *Bush*, 64.)

HAISELL & MITCHELL AND W. LINDSAY, FOR APPELLEES.

1. Appellees have a prescriptive right of way over the road, and the court committed no error in adjudging them entitled thereto.
2. A dedication may be proved by use alone. (63 *Maine*, 434; *Cent. Law Journal*, Aug., 1878; 27 *Mo.*, 259; *Hall v. McLeod*, 2 *Met.*, 102.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellees were sued by the appellant for trespass, which he averred was committed by them upon his lands.

They answered, and by way of confession and avoidance, admitted the entry, but alleged a right of way in the public over the lands in question, which they, as citizens, claimed the right to use alone on the ground that it is a public road.

The evidence tends strongly to establish a grant or right by prescription in the appellees to the use of the alleged way. But after careful scrutiny, we find that the pleadings do not present any issue based upon the private right

2r	323
86	100

79	323
96	204

79	323
L116	684
79	323
L116	634

79	323
f122	356
122	353

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or interest of the appellees to the way in controversy. And it is an indisputable rule that an allegation neither proved nor admitted, or a ground of defense not alleged in the pleadings, although proven, is to be treated as if such allegation or defense did not exist. (Newman's Pl. and Prac., 723; Kearney v. City of Covington, 1 Met., 343.)

A grant of a right of way by prescription will be conclusively presumed from an uninterrupted, unexplained, adverse use, or a use of such a nature as to indicate a claim of right, and not the effect of indulgence or permission for a period of fifteen years or more. (Bowman v. Wickliffe, 15 B. Mon., 99; Hall v. McLeod, 2 Met., 98-101; Thomas v. Bertram, 4 Bush, 317-19.)

Prescription is merely a *personal* usage (2 Blackstone, chap. 17), and as appellees seek to establish their defense through the rights of the public, and not upon any private right in themselves, the question is, as presented by the pleadings, was there a dedication of the disputed way to the public, and such an acceptance of the dedication as constitutes the way a *public* road?

Both a dedication and an acceptance must concur. The former may be made by deed, or result from such use and lapse of time as would constitute a right in an individual by prescription.

And we are of the opinion that it would not be unreasonable to presume, from the facts in this case, a dedication; but there is no such acceptance of it by the proper authority as creates a public highway.

In the case of the Commonwealth v. Kelley, 8 Grattan, 636, it was held by the Virginia court, that the right to accept a public road is vested in the county courts, and before it can be a public road, the acceptance must be by

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record. But that it is not necessary to enter a formal acceptance on the records, as any entry showing the court regards the road as a highway will be sufficient, such as laying it off into precincts, and appointing surveyors over it, and the like.

Forty years' use of the way, that had been repaired occasionally by the town in which it was situated, was held to be sufficient to establish the acceptance in the case of *Reed v. Northfield*, 13 Pickering, 13. Where for fifteen years the county court had, from time to time, appointed surveyors of the road as a public highway, and allotted hands, who worked it, it was held that an acceptance should be presumed, although the evidence strongly conduced to the belief that no order was ever made by the county court establishing or accepting the road. (*Elliott v. Treadway*, 10 B. Mon.)

An appropriation to public use of a way by any act of the county court, as such, is a sufficient acceptance of its dedication; and the more ancient the use upon the part of the public the less strictness will be required in proof of the act of acceptance.

The manner of the acceptance, as well as the authority to make it, was determined by this court in the case of *Gedge, &c., v. Commonwealth*, 9 Bush, 64.

The language of the opinion on this topic is:

"A road or street dedicated to the public must be *accepted* by the county court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance. The continued use of a road by the public for fifteen years or more, with the *exercise* of power on the part

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of the county court over it, by appointing overseers, &c., would constitute it a highway."

There are numerous cases to the same effect in a number of states, but it is not necessary to parade them here.

Many reasons are set forth in the various authorities upon this subject for departing from the English doctrine.

The principal reason, however, is based upon the new condition of our country, the great extent of uninclosed lands, and the habit which is customary of traveling over them without asking permission, and the frequency of opening roads by owners for their own convenience which other persons are permitted to use. (*Bowman v. Wickliffe*, 15 B. Mon, 98-9.)

The cost of inclosing open lands to prevent their use from ripening into prescriptive right, or creating a dedication to the public, would be exceedingly burdensome. And to interpose an objection to the use by a neighbor or a traveler of a way opened for the convenience of the owner, although done to protect his title, would render him obnoxious, because his conduct would be contrary to the custom prevalent in this state.

And therefore, where a dedication is claimed to have been made to the public, reason and authority require, as a protection to the land-owners, the acceptance of the dedication to be made by the constituted representative of the public in its organic capacity, upon its records, or by such acts of control or recognition as will furnish a presumption of their existence.

There is no proof in this record of any act by the county court relative to the way sought to be maintained over appellant's land.

Wherefore, the judgment is reversed.

Bradley, v. Curtis, &c.

CASE 68—EQUITY—MARCH 19, 1881.

Bradley v. Curtis, &c.

APPEAL FROM ROBERTSON CIRCUIT COURT.

1. The assignee of notes for purchase-money for land, the lien being carried by the assignment, does not waive his lien by accepting personal security, unless it appears that he intended so to do.
2. The lien passed as an incident to the assignment.
3. As long as purchase-money can be traced, no matter how often the evidence of the debt be changed, the lien therefor cannot be defeated by a claim to a homestead.

W. BUCKLER FOR APPELLANT.

1. The purchase-money due for the land must be paid before a homestead can be allotted. (Sec. 9, art. 13, chap. 38, Gen. Stat.)
2. The sixteenth section provides that the homestead exemption shall not apply to sales under execution, attachment, or judgment at the suit of creditors, if the debt or liability existed prior to the purchase of the land.

CHAS. LYTLE AND CLARK & SIMON FOR APPELLEES.

The taking of personal security creates a novation, and the lien upon the land for purchase-money is waived, if it ever existed. The notes are not in fact for purchase-money.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellee, Ashcraft, sold twenty acres of land to the appellee, Curtis, in consideration of \$298.50. The latter executed three promissory notes of equal amounts therefor to the former, who made to him a title-bond for the land, and thereafter assigned the notes to the appellant, Bradley, who, after holding them for some time, accepted three new notes for the principal, and interest at the rate of ten per cent. of the aforementioned notes, with appellee Ashcraft as surety thereon for Curtis, and took from them a mortgage on the twenty acres, and on nine and a half acres belonging to Ashcraft, to secure their payment.

2r	327
4r	153

79	327
108	471

79	327
128	83

79	327
132	308

Bradley v. Curtis, &c.

It is stated in the mortgage that the right to the land under the homestead law is waived and conveyed to appellant, and that the sum for which the notes were given "is the purchase-money of the land that is set forth in this article."

The wife of Curtis did not join in the mortgage, and the twenty acres are not worth \$1,000. The appellees pleaded, and the court below held, that the above facts constituted a waiver and satisfaction of the lien for the purchase-money, and that Curtis was entitled to a homestead in the twenty acres, and decreed a sale of the nine and a half acres to pay appellant's debt. From that judgment he appeals.

It is insisted by appellees that the judgment is correct for the reasons assigned.

The adjudged cases prior to 1843 do not seem to be uniform as to whether the rule in regard to waiver of lien is based upon particular facts without regard to the intention of the party or not.

The taking of security for the payment of the purchase-money was, by the Roman law, a positive waiver of the lien. And the same facts viewed by different English and American judges, under a less stringent rule, have not been determined alike. While this uncertainty is to be regretted, the rule seems now to be very well settled that the vendor or assignee of the debt for purchase-money, with which the lien is carried by the assignment, does not waive his lien by taking personal or property security, unless the facts show he intended thereby to waive it.

This view was taken in the case of *Henley v. Stemmons, &c.*, 4 B. Mon., 132, in which the case of *Ducker & Jones v. Gray*, 3 J. J. M., was reviewed, and the doctrine contended for by appellees' counsel denied.

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Quoting from Story's Equity, the court said, "that the question of waiver of his lien by the vendor, by taking other security, is a question of *intention* to be established or explained by the proof," and proceeded to decide, in effect, that a vendor in whom the title remained did not lose his hold upon the estate sold as a means of payment "by taking personal or *other* security for the same."

In Mackreth v. Symmons, 15 Vesey, 348, it is said: "There is great difficulty to conceive how it should have been reasoned almost in any case that the circumstance of taking a security was evidence that the lien was given up."

It was held by this court, in Lusk v. Hopper, trustee, &c., 3 Bush, 185, as the vendor had not conveyed the land to the vendee, his lien was not extinguished by renewing the note or notes for the unpaid part of the purchase-money with personal security.

The same principle was announced in the cases of Rennick v. Hendricks, 4 Bibb, 303, and Honore's ex'r v. Bakewell, &c., 6 B. M., 67.

Ashcraft executed a title-bond to Curtis, but has never conveyed to him the title to the twenty acres.

Yet it is maintained, as the appellant has lost his recourse upon Ashcraft personally, by neglecting to sue upon the assigned notes, he cannot be substituted to the rights of Ashcraft to the lien for their payment.

The lien passed as an incident to the notes by the assignment to the appellant, who thereby became entitled to the lien by which their payment was secured. (Duncan v. Louisville, 13 Bush, 378.)

And he also acquired all equitable right to all remedies for the enforcement of payment of the notes by virtue of the assignment; and "the continued subsistence of the lien

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in his favor, or for his benefit, does not depend upon the existence or continuance of a personal liability of the assignor to him." (Ripperdon v. Cozine, &c., 8 B. Monroe, 466.)

The vital question, therefore, in this case, and which remains to be decided, is, did the appellant waive or intend to waive the lien which he acquired by the assignment?

The facts, as shown by the authorities cited, do not *per se* constitute a waiver; nor do we think they evidence an intention by appellant to waive his lien, but rather to perpetuate and add to it.

The mortgage expressly recognizes the debt for which the new notes were given as the purchase-money of the twenty acres of land, and in addition thereto Curtis and Ashcraft agreed to waive the right to the land under the homestead law.

As section 9, article 13, chapter 38, General Statutes, in exempting homesteads, excepts judgments for the purchase-money due therefor from its operation, it is almost conclusively manifest, from the terms of the mortgage, that the appellant did not intend to waive his lien, nor did the appellees have the right so to believe, but that the exception contained in the law was in view when the mortgage was executed.

Section 16, *Ibid*, declares that the exemption shall not apply "if the debt or liability existed prior to the purchase of the land." The object of this provision is to prevent the use of property or money obtained on credit in purchasing lands and claiming them under the homestead exemption laws.

The debt evidenced by the new notes, save any usury that may have been embraced in them, was created simulta-

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neously with the purchase, and was a part of that transaction, and it must be treated as existing prior to the purchase of the land, and within the spirit of the statute, because no purchase of the land could have been made without first creating the liability to pay for it.

To hold otherwise would defeat the purpose of the provision of the statute against the injustice which the facts of this case accurately illustrate.

The right to a homestead is purely statutory.

And without reference to liens or their priority, in pursuance of the policy which forbids the consumption of another's substance in procuring a homestead, without remunerating him, declares, in effect, that no homestead shall be exempt until the purchase-money therefor be paid.

And so long as it can be traced, no matter how often the evidence of the liability therefor may be altered, the enforcement of the lien for its payment cannot be defeated by the homestead plea, unless the lien has been waived which presents a question of intention to be determined by the facts of each case.

The appellant, without the knowledge of Curtis, purchased a note on him from Taylor.

Thereafter Curtis made a payment to appellant without directing him to credit it on the mortgage notes.

At the time of the payment, Curtis was ignorant of the assignment by Taylor of the note, and the appellant said nothing to him about it, and appropriated the payment to its discharge.

If Curtis had been advised of the assignment at the time he made the payment, in the absence of directions by him, the appellant could have legally appropriated it.

Allensworth v. Kimbrough.

But he had no right to conceal from Curtis the fact of the assignment, and exercise the power of appropriating the payment to the discharge of the note, when Curtis must necessarily have supposed, and the appellant known, that he was making the payment on the mortgage notes.

He could not thus withhold from Curtis the intelligence which would have made an express appropriation of the payment by him necessary, and then by taking advantage of his own wrong, make it himself against Curtis' consent.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 69—EQUITY—MARCH 29, 1881.**Allensworth v. Kimbrough.**

APPEAL FROM TODD CIRCUIT COURT.

1. When the right to a homestead, as such, is derivative, the legal title to the land is in the heirs, subject to the right of occupancy; but when it is original, the title is in the party claiming the homestead, with the right to dispose of it as well as its proceeds.
2. The appellant, as the devisee of her husband, holds an independent right to a homestead in the land devised, which cannot be subjected to debts incurred by her after his death.

G. TERRY AND JNO. & J. W. RODMAN FOR APPELLANT.

Mrs. Allensworth became entitled to her land by her husband's will. She has an independent title in fee, and has the same right to a homestead in the land as if she had bought it after her husband's death. (Gen. Stat., 433-5; *Lear v. Totten*, 14 Bush, 104; *Booth v. Collins*, 11 *Ib.*, 622; 12 *Ib.*, 404.)

No brief for appellee.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

P. B. Allensworth died leaving a widow, appellant, and five children, to whom he devised jointly a certain tract of

Allensworth v. Kimbrough.

land, on which the widow and children reside as a home. Subsequent to the devise and occupancy by the widow and children, the widow contracted debts, and to enforce their payment this action was brought to subject the interest of the widow in the land. She claiming a homestead, the court caused her interest to be set aside and valued, and the value of her portion not being more than her homestead right, the court decreed it to be sold subject to her right of occupancy as a homestead during her life, and to the right of occupancy by the children after her death.

The only question is, was the homestead interest subject to sale under any circumstances? We think not.

The statute provides, in general terms, that the homestead shall be exempt from sale under execution, attachment, or judgment of any court, except for purchase-money or a mortgage debt. To this there is but one other exception, and that is, where the homestead of the husband is continued for the benefit of the widow and children, it may be sold, subject to the right of occupancy by the widow and children, when it is necessary to pay the husband's debts. Two things must concur to make out this exception: first, the widow must hold the homestead as the homestead of her husband, claiming her right through him by reason of the exemption to him; second, the sale must be to pay the debts of the husband. Neither of these conditions are found in this case. The widow does not claim the homestead as the homestead of her husband, which continues for her benefit by reason of the language of the statute, but she claims it as an original right existing in her by reason of the fact that she is the owner in fee of the land. She stands exactly in the attitude that she would occupy if she had purchased the land and subsequently contracted

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debts, and in the same attitude as the husband were he living, and a sale of his homestead was sought to be enforced. The exemption is to enable the head of the family to secure it a support, and it is immaterial whether the head of the family is a man or a woman; their rights are the same, except in the case where the woman derives her homestead right through the husband, and not as purchaser. When the homestead right is derivative, the legal title to the land is in the heirs, subject to the right of occupancy; but when it is original, and the legal title is in the party claiming the homestead, the right to dispose of the homestead and dispose of the proceeds as the owner may choose cannot be questioned. In that case the right is not one simply of occupancy, but there is an absolute right of alienation, so there can be no right in the creditor to effect a sale so long as the homestead exists. Such a right would be inconsistent with the owner's right of alienation and disposition of the proceeds.

Judgment reversed, and cause remanded with directions for further proceedings.

CASE 70—EQUITY—MARCH 19, 1881.

City of Louisville v. Anderson, &c.
Same v. Joyes.

APPEALS FROM LOUISVILLE CHANCERY COURT.

1. Taxes illegally assessed by the city of Louisville, by mistake of law upon land used only for farming purposes, and paid to the collector by the owners, by mistake of both law and fact, may be recovered back from the city.
2. Where a party "has his day" in court to litigate a demand, but, instead of doing so, voluntarily pays it, he is without remedy.

2r 334
87 613

79 334
80 540

79 334
102 78
102 79
102 460

79 334
100 588

79 334
e111 60

79 334
124 475

79 334
133 484
136 426

79 334
132 622

City of Louisville v. Anderson, &c. Same v. Joyes.

3. But, being compelled either to pay the taxes or suffer his property to be sold by the collector, he has his action against the city to recover back the money wrongfully demanded by the agent of the city.
4. Failing to rejoin to the reply of appellees that they did not discover their mistake until a fixed period, the averment must be taken as true.

T. L. BURNETT, CITY ATTORNEY, FOR APPELLANT.

1. The money was voluntarily paid.
2. Appellees had full knowledge of the situation of their land, and having voluntarily paid the taxes, they cannot recover them back.
3. The payments were made without protest or objection. More than five years have elapsed after appellees, by ordinary diligence, ought to have discovered the alleged mistake.
4. The weight of authority outside of Kentucky is, that money paid under mistake of law cannot be recovered back. (Ray, &c., v. Bank of Kentucky, 3 B. Mon.; Covington v. Powell, 2 Met., 228; Louisville v. Henning, &c., 1 Bush, 383; Cooley on Taxation, 566-7-8; Burroughs on Taxation, 266; Underwood v. Brockman, 4 Dana, 317; Courtney v. Louisville, 12 Bush, 418; 51 Barb., 159; 13 Gray, 476; 24 Conn., 88; 31 Penn. St., 73; 7 Cushing, 123; 34 Ala., 400; 1 Ohio, 268; 9 Cowan, 674; 1 Story's Eq. Jur., 148, 156; Kerr on Fraud and Mistake, 408; 27 Pa. St., 497; 2 Johns. Ch'y Rep., 51; 10 Peters, 153; 27 Maine, 145; 39 Ind., 234; 2 Bur., 1009; 2 H. Bl., 214; 5 Taunt., 160; 2 East., 469; Broom's Leg. Max., 174 to 185; 2 Smith's Leading Cases, 453 to 468; 4 Bush, 636; Grundy v. Grundy, 12 B. Mon., 271.)

SIMRALL & BODLEY, P. JOYES, AND W. LINDSAY FOR APPELLEES.

1. Money paid under mistake of law and fact to one colorably but illegally claiming to be entitled to it, may be recovered by the party paying it.
2. The money sought to be recovered was paid under compulsion.
3. Limitation cannot begin to run until after the discovery of the mistake. (Underwood v. Brockman, 4 Dana, 315; Mosely, 364; 8 Wheat., 214; 5 Conn. R., 401; Ray v. Bank Ky., 3 B. Mon., 512; Gratz v. Redd, 4 B. M., 190; 1 Met., 153; 3 *Ib.*, 228; Henning v. Louisville, 1 Bush, 383; 2 Barn. & Cr., 729; Sm. Lead. Cas., 395; 7 Man. & Gr., 294; Lightfoot v. Walker, 12 Bush, 498; 4 Met., Mass., 187; 5 R. I., 472; Covington v. Powell, 2 Met., 226; 7 Cush., 444; 4 Met., 190; 17 Pick., 214; 3 Cush., 571; Dye v. Holland, 4 Bush; Crane v. Prather, 4 J. J. M.; 40 N. Y., 402; 1 Hill, 287; Lucas' Dig., 30, 259, 260; Johnson v. Louisville, 11 Bush, 534; 70 N. Y. Rep., 500; 12 Bush, 421.)

City of Louisville v. Anderson, &c. Same v. Joyes.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

These several actions in equity were instituted in the Louisville chancery court by George W. Anderson and others against the city of Louisville, in which it is alleged that they (the plaintiffs) are the owners of certain real estate in the county of Jefferson, within the corporate limits of the city of Louisville, a municipal corporation created by the laws of the state, and authorized to sue and be sued; that this corporation for a number of years not only claimed the right, but did in fact tax the lands of the plaintiffs (now appellees) for its own municipal purposes, and to defray the expenses of its municipal government. The lands taxed are then particularly described, as well as the assessment, levy, and collection of the taxes for each year, and it is further alleged that the land had been used during those years for farming purposes, and that the same had never been appropriated to or used for city purposes, and the jurisdiction, authority, and government of the city are of no use or benefit to the land or its owners; that the extension of the boundary of the city so as to embrace this land was to enable the corporation to tax it, and thereby increase its revenue, and for no other purpose; that the taxation was unjust and illegal, and is not now imposed on the land, and the said city authorities have, since the collection of these taxes, expressly declared that this land was not the subject of taxation, nor does the corporation now claim or assert the right to tax this property. The appellees also allege, they paid these taxes under a mistake of law and fact, and in ignorance of their rights, and when they believed the city, by reason of its charter, had the right not only to extend its boundaries, but when extended, had the right to tax all property within its corporate limits, and being satisfied

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the same was a legal charge on the land, and that the corporation would proceed, as it threatened to do, to coerce payment by a sale of the property; that the corporation, on a proper demand made, refused to refund the money wrongfully collected. These, in substance, are the facts alleged in each petition, and the only denial by the city is, the payments were not made under a mistake of law or fact, and an affirmative allegation that, in view of the location of the land and its relation to the city population and improvements, the right of the corporation to tax was at least questionable, and the appellees, with a full knowledge of all the facts, consented to the tax, and paid it voluntarily, and without even a protest. The corporation also pleaded the five years' statute of limitation, and the appellees replied that they did not discover the mistake made by them as to their legal rights until the tenth of January, 1877, to which there was no rejoinder.

The chancellor adjudged the appellees entitled to recover on the ground that they made the payment under a mistaken belief as to the right of the city to impose the taxes, and that it would proceed to sell the property (as it had threatened) if the taxes were not paid. It is plain, if the decision of this court in the case of Courtney against the city is adhered to, the corporation had no right to levy these taxes, and equally as clear the appellees paid them under a mistaken belief that the city had the right to impose the burden. There was no question raised between the corporation and these tax-payers as to their liability for the tax, and therefore it was not paid by way of compromise or when the appellees had reason to doubt the exercise of such a power on the part of the corporation. It is

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maintained by counsel for the city, in an argument of much force, and not wanting in authority to support it, that although the city may have had no right to tax this property, and the payment of the tax was made by appellees under a mistake as to their legal rights, they cannot recover back the money. This is the sole question in the case.

A demurrer was filed by the city to the several petitions; but that pleading presents the same question as that arising from the proof. This court will assume, without discussing the facts of the case, that the corporation exceeded its power in levying this tax and requiring its payment. The proof is conclusive on that question. It is argued by counsel for the city that this question does not arise upon any contract made between the corporation and the tax-payer, but by reason of a contribution imposed by the former on the latter for public purposes; and when this burden is imposed, there is a moral and political duty resting on the citizen to discharge it, and although the tax is unconstitutional, if voluntarily paid, cannot be recovered back.

In the case of *Underwood v. Brockman*, 4 Dana, this court said: "When it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and where there has been no fair compromise of *bona fide* and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." This doctrine had been previously announced by this court, in the case of *Fitzgerald v. Peck*, and was followed in the case of *Ray v. Thornton*, 3 B. Mon., in which it is said: "Whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money

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has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor and good conscience ought not to be retained, it was and ought to be recovered back." The same doctrine has also been recognized in numerous other cases decided by this court, in all of which the court has been careful to say, in substance, that where the parties are differing as to whether a contract was entered into, or the nature and character of its stipulations, or have made a compromise of an honest and *bona fide* claim, the chancellor will not grant relief on the ground either of a mistake of law or fact. The Supreme Court of Connecticut, in *Northrop v. Grave*, 19 Conn., says: "We mean distinctly to assert, that when money is paid by one under a mistake of his rights and duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, whether such mistake be one of fact or law, and this, we insist, may be done both upon the principle of Christian morals and the common law." In the class of cases arising on contracts in which such relief has been granted, and when the parties not only contract, but are competent to understand their business transactions, a much stronger case, it seems to us, should appear, evidencing the mistake complained of, than in cases where a corporation invested with the power to tax assumes to exercise the power in plain violation of the constitutional rights of the citizen. The citizen has no voice in imposing the burden, and must submit to a proper exercise of the power, however onerous it may be, and in determining whether the legislative action of the state or city government in such cases is within constitutional limits, he has the right to presume the perfect legality of such action, and the

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maxim, *ignorantur lex non excusat* does not apply. Ignorance of law will not excuse one from the violation of either the criminal or penal laws of his country, nor will it ordinarily relieve him from mistakes committed in the business transactions of life; but he is not presumed to know more than those who constitute the legislative and executive departments of the government under which he lives, whether state or municipal, and if relief can be granted in reference to contracts between individuals, the stronger the necessity for the interposition of the chancellor in a case like this, where the burden is not self-imposed, or discharged by reason of any moral or political duty.

While the payment of taxes is both a legal and moral duty, no obligation rests on the citizen to pay or submit to a wrong assessment; and when he pays an unauthorized tax, having discharged the burden as a law-abiding citizen, he had the right to believe, when making the payment, there had been no abuse of the power to tax by those to whom it had been confided. Instead of punishing the citizen for complying with what he believed to be his duty, by withholding from him the money he has wrongfully paid, he should be encouraged to assume such burdens, instead of resisting the collection, and this should be done by refunding him the money paid when there was no legal or moral obligation upon him to make the payment, nor any legal or moral right on the part of the city to make the demand or collect the money.

It is true that Cooley on Taxation lays down the doctrine, "that a tax voluntarily paid cannot be recovered back; or says that it has been held by the authorities, with very few exceptions, and it is immaterial in such a case that the tax is illegally laid, or even that the law under which it was laid

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was unconstitutional: every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back."

He further says: "All payments of taxes are supposed to be voluntary which are not made under protest, or under the apparent compulsion of legal process."

In the case of *Sheldon v. School District*, 24 Conn., 88, it was held, if one's land is sold for taxes after protest, and he buys it in, it must be regarded as a voluntary payment, and will give him no right of action. The case of *Taylor v. Board of Health*, 31 Pa. St., the taxes had been levied under an unconstitutional law, and paid for a series of years, when an action was brought to recover it back. The court said: "The money was paid without dispute, and he thus assented to the collection of tax for public purposes, and of course to the application of it. Relief was denied."

In the case of *Town Council v. Burnet*, 34 Alabama, it was held that the payment of money to a town clerk, as the price of a license under an ordinance afterwards declared void, could not be recovered back.

All these, and many more cases referred to, sustain the position assumed by the attorney for the city; but in the last named case, in denying a recovery for money paid under the void ordinance, the court distinguishes that case from one where money has been paid in discharge of a void assessment of taxes, because in the latter case there was an apparent means of enforcing the illegal demand without resort to judicial proceedings, and without giving the party a day in court. (*Viley v. Palmer*, 14 Alabama; *Crutchfield v. Wood*, 16 Alabama.)

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While this court recognizes the rule laid down in *Cooley* and the decisions following it, we differ in the conclusion reached as to what constitutes a voluntary payment of taxes. In the case of the *City of Covington v. Powell*, 2 Met., 226, Powell instituted an action against the corporation, in which it is alleged, "that the money paid by the plaintiff was paid as taxes based on an illegal assessment made by the city, and in ignorance of his rights, or of the fact the assessment was illegal; but he believed at the time it was legal and collectable." The city did not contradict the fact that the assessment was void, but pleaded that the plaintiff was apprised of the law and facts when he paid the taxes, and with such knowledge made the payments voluntarily; and further averred "that the appellant had enjoyed the benefits from the improvements made by the money collected under the assessment, in common with the other inhabitants of the city." It was held in that case that the promptitude and obedience of the plaintiff to what he supposed was the law should not prejudice his right to reclaim the money paid, if paid wrongfully, and in ignorance of his rights; nor did it appear that he or his property had received any special or direct benefit from the money paid, and therefore a recovery could not be denied. The judgment of the court below was affirmed, and the money improperly collected ordered to be restored.

In the case of the *City of Louisville* against *Henning & Speed* the latter sued the city to recover back a sum of money paid under an invalid assessment, alleging that the plaintiffs paid the money in ignorance of their rights. The city denied that the tax was unauthorized and invalid, but admitted that if no lawful authority existed to impose the tax, then the plaintiffs paid the money in ignorance of their

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rights. This court held the taxation unauthorized in that case, and affirmed the judgment of the court below requiring the city to refund the money. The plaintiffs in that case knew as much of the law and facts applicable to their rights as the plaintiffs in the present case. They knew their property had been taxed, and believed the city authorities had the power to impose the burden, and for that reason paid it. These cases were followed by the case of the City of Bowling Green v. Elrod, MS. Opinion, and we find no decision of this court in conflict with the doctrine recognized and established in these cases.

In the present case, both the city and the appellees acted in good faith. They both believed the taxation to be constitutional, until it was finally made to appear that both were mistaken, and that the city had received the money of appellees without any consideration. There was no contract or bargain in this case by which one undertook to pay and the other to receive. The money was not paid at the instance of the tax-payer to one who was a mere passive agent without authority to demand or coerce payment, but to one who had not only the authority to receive it, but to exact payment by levying on the property taxed; and upon the refusal of the appellees to pay, a sale of the property was inevitable. The party charged with payment has been afforded no opportunity of being heard, and knows that the tax-gatherer is clothed with the process of the law to enforce his demand if payment is denied. Such a payment, or a payment made in ignorance of the fact that the taxation is void, with a knowledge that compelling process is at hand to coerce the demand, must be regarded as involuntary, and the party entitled to recover his money.

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Where a party is entitled to a day in court, and can litigate the demand about to be enforced against him, but instead of doing so, voluntarily pays it, he is without remedy. When he can plead and make his defense, a payment made under protest will be regarded as voluntary, or if he has an option either to litigate the question or submit to the demand and pay the money, in all such cases there is no compulsion, and relief will be denied. (*Herron v. Monroe*, 7 Cushing, 131.)

In the case of the Town Council of Cohaha v. Burnet, already cited, where money was paid to the clerk of the town in order to obtain a license to retail liquor, and the ordinance requiring the license was subsequently held void, it was adjudged that no recovery could be had of the money paid to the clerk, as there was no proof the payment was coerced or any summary process compelling its payment. The party could have refused to pay the money, or could have tested the validity of the ordinance without subjecting himself to a penalty, or could at least have refrained from selling his liquor or goods. The payment of taxes is regarded as involuntary, because the tax-collector has the authority to levy and sell on the refusal to pay. The process is summary, and in the hands of the party making the demand, and the tax-payer must submit to the levy or pay the money. The distinction is plain between such cases, and where the one making the payment is himself claiming the right, and the recipient of the money the mere passive agent of the corporation. We do not mean to be understood, in recognizing this distinction, as assenting to the doctrine that no recovery can be had in any case where the money sought to be recovered has been paid under a mistake of law, and without compulsion.

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As to the plea of the statute of limitation, we should have no hesitation in confining the appellees to a recovery within five years next preceding the commencement of the action, but for the statute providing that "in actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud." (General Statutes, section 6 of article 3, chapter 71.)

In this case the appellees, to avoid the plea of the statute, reply that they did not discover the mistake until a fixed period, and to this reply there is no rejoinder; so the matter in avoidance stands confessed and must be taken as true.

We do not mean to adjudge that a decision of this court, determining such taxation illegal and void, will control the decision as to when this discovery alleged by the appellees was first made, as such a decision can afford no guide in determining the issue. The party is required to show, when the mistake originates from his own action as well as that of another, that he has exercised such diligence as a prudent man would exercise in ascertaining what his rights are, and five years in which to make such a discovery should certainly be held sufficient. In this case, however, the mistake was mutual, and both acted during the whole period as if the right to demand and receive was unquestioned. Whether this should alter the rule as to diligence is not necessary to inquire, as the pleadings settle that question.

Judgment affirmed.

This opinion applies also to the case of Pat. Joyes v. City of Louisville, the cases having been considered together.

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CASE 71—EQUITY—MARCH 29, 1881.

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APPEAL FROM LINCOLN CIRCUIT COURT.

1. A party who holds a mortgage upon property that is insufficient to satisfy all the liens upon it is entitled to contest the existence of mortgage liens asserted by others, although his debt may not be due, and although his mortgage may not have been executed until after the other mortgagees had instituted suit to enforce their liens.
2. When a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, the action of the latter is not a *lis pendens* until he has filed his cross-petition and had process issued.
3. If the fact that a claim is tainted with usury is disclosed by the record, the chancellor will purge the claim, although the debtor may refuse to make such a defense.

PORTER & WALLACE FOR APPELLANTS.

1. Appellant was not, as to appellee Hayden, a *pendente lite* purchaser, as Hayden had not filed his cross-petition at the time her mortgage was executed. (Secs. 96 and 97, Civil Code.)
2. A junior mortgagee, although his debt may not be due, has such an interest as to entitle him to contest the claim of a senior mortgagee, as by showing that it has been in part paid or is tainted with usury, although his mortgage may not have been executed until after the senior mortgagee instituted suit to foreclose his mortgage. (1 Dana, 25; 5 B. M., 274; 10 B. M., 118.)

T. P. HILL AND M. C. SAUFLEY FOR APPELLEES.

1. Appellant's debt having not yet matured, she is not entitled to contest the validity of appellee's claim.
2. Appellant was a *pendente lite* purchaser, although appellee had not filed his cross-petition when her mortgage was executed, as the *lis pendens* was complete upon the filing of the original petition setting up appellee's lien. (Story's Eq., sec. 406.)
3. A *pendente lite* purchaser is not entitled to be made a party to the pending litigation to subject the property purchased to the payment of debts. (Childs v. Burton, 6 Bush, 619; 1 Bush, 427; *Ibid*, 230; 10 Bush, 437; Chancery Digest, 152; 1 Dana, 578; 1 Daniels' Chancery Practice, star page 328.)
4. Usury is a personal privilege, and can be pleaded only by the debtor. (2 Parsons on Contracts, part 2, page 399.)

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This case has been heretofore decided, but on a petition for a rehearing, we have deemed it proper to discuss more fully the questions raised, although satisfied that the doctrine announced is neither so novel or uncertain as to require an elaborate argument in support of it.

On the 23d of December, 1875, Grigsby and wife borrowed of Ballou \$6,000, and executed to him a mortgage on a certain tract of land to secure its payment. Ballou, on the 19th of September, 1878, filed his action in equity in the Lincoln circuit court, asking a sale of the land to satisfy the mortgage debt. Prior to the execution of this mortgage, Grigsby and wife (the wife then trading as a *feme sole*, and empowered to act as such) had executed a mortgage to the appellee Hayden on this land, to secure him in the payment of \$5,324. This mortgage was dated on the 26th of April, 1869, and the note payable in three years from that date. This land belonged to the wife (Mrs. Grigsby). Ballou made Hayden a defendant to his action, alleging the existence of his lien, and on the 30th of September, 1879, Hayden filed his answer and cross-petition against Mrs. Grigsby (the husband being dead), asking an enforcement of his lien, and also a judgment *in personam*. On the 30th of October, 1879, the appellant, Mrs. Hart, filed a petition to be made a party to the action of Ballou, making it a cross-petition against the mortgagor, Mrs. Grigsby, in which she alleges that the latter, on the 21st day of March, 1879, executed to her (Mrs. Hart) a mortgage on the same land to secure the payment of \$20,000, evidenced by certain notes, and due five years from that date. She alleges the insolvency of the obligor, the insufficiency of the land to satisfy all the mortgage debts, and asked to be allowed to

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contest the validity of the mortgage claim set up by Hayden, on the ground that payments had been made for which no credit had been given, and that the claim, or a greater part of it, was usurious. On motion of Hayden the answer and cross-petition was stricken from the files, or a demurrer sustained, and her petition dismissed. This ruling of the court below, as indicated by counsel for the appellee, was made for the reason that the appellant, Mrs. Hart, was a *lis pendens* purchaser, and because her several debts were not due. The mortgage to Mrs. Hart was executed after the institution of the action by Ballou, but before the answer and cross-petition of Hayden, the appellee, was filed, and this court held in the original opinion, that so far as Hayden was concerned, the appellant could not be regarded as a *lis pendens* purchaser, although Hayden had been made a defendant to Ballou's petition. That to constitute Mrs. Hart such a purchaser on the complaint of Hayden alone, his cross-action should have been filed and process issued. Ballou is not appealing, and if he was, the doctrine applicable to a *pendente lite* purchaser cannot control the decision of the question presented in this case.

While the appellant is not in a condition to coerce payment of her debt, there is no reason why the estate given or pledged to secure its payment should not be preserved as against those who have no claims, or are asserting liabilities that ought not to be enforced by the chancellor.

The probability that the debtor may, when the debt of the appellant matures, be in a condition to pay it, furnishes no ground for refusing the relief asked, when it is manifest, if her petition is denied, her security is not only likely to be diminished, but her entire debt lost. This is upon the assumption that the statements of the petition are true, and

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when considered on demurrer, must be so regarded. The action of Hayden was not a *lis pendens* when the mortgage of the appellant was executed; but whether so or not, we deem it unnecessary to determine. We have no reason, on the hearing of this case, on the question of law raised by the demurrer, to doubt the validity of the transaction between Mrs. Hart and Mrs. Grigsby. The former held notes on the latter, and for the purpose of securing them, obtained the mortgage on this land. There is no rule of law or equity that would prevent the appellant from taking such a mortgage, although at the time of its execution actions were pending by both Ballou and Hayden to foreclose their mortgages. The execution of the mortgage by Mrs. Grigsby gave to the appellant an equitable lien on the land, subject to the prior *bona fide* encumbrances; and if either of these encumbrances have been discharged, or are without consideration, they cannot be enforced to the prejudice of a *bona fide* mortgage, although junior in date; so, if the claim of Hayden has been paid, or is usurious, the right of the appellant would be affected by a sale of the land, and a preference given to a debt that had been satisfied, or was based on a vicious consideration.

Mrs. Grigsby may not have pleaded usury, or may be willing to a judgment selling the land for appellee's debt; still she cannot, either by her silence or a refusal to plead, permit this property upon which appellant's lien exists to be sold for a debt based upon a vicious consideration. The plea of usury is not a personal privilege, and with such allegations as are contained in appellant's petition, any defense that the debtor could have made to the merits of the action should be allowed to be made by the appellant. She had the right to go into a court of equity because of the equit-

able interest she had in the property. Her remedy was not at law, but to preserve a lien that the parties had the right to create for the security of her debts. It is argued, however, that this was a *lis pendens*, and therefore the claims of the appellant should be disregarded. In what way can it be termed a *lis pendens*, and how is the mortgagee, in a mortgage taken during the pendency of an action to foreclose an older mortgage, affected by that proceeding? It is certain that the chancellor will not delay the prosecution of the action by the first mortgagee, for no other reason than to allow the junior mortgagee to foreclose his mortgage. Having taken it during the pendency of the action, the mere fact that he has a lien is not sufficient to authorize the filing of his petition to be made a party. Such a practice would cause much injustice and delay, and by a repetition of the transaction would prolong the prosecution of the original action for an indefinite period. Such is not the case here. The appellant has not only an equity in the land, or rather its proceeds, but she proposes to show the insolvency of her debtor, and that these prior claims have been satisfied, or are all usurious. Is the *lis pendens* an answer to such a petition? Can the fraudulent mortgagee prevent the *bona fide* mortgagee, because his mortgage is senior in date, and an action is pending to foreclose it, from contesting the validity of his claim? A *pendente lite* purchaser is bound by the judgment, and it may well be doubted whether the appellant, if she stood by and permitted this judgment to be rendered, with a knowledge of the want of equity in appellee, could, after the judgment, obtain any relief. The right to recover what is due these prior mortgagees is conceded, but we know of no rule of law or equity that will preclude a junior mortgagee from attacking a senior mortgage as fraudulent, although he may

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have acquired his mortgage after suit has been instituted to foreclose by the fraudulent mortgagee. A creditor, under his ordinary execution, may sell the mortgaged property while a suit is pending to foreclose it, and purchase it without regard to the mortgage, if fraudulent, and thereby acquire title. If the doctrine maintained by counsel for appellee prevails, the older mortgagee, if his entire claim is usurious, may enforce it, if the junior mortgage is taken after his action is instituted. The chancellor would certainly permit the junior mortgagee to pay off the prior encumbrances, and when he undertakes to show that they have already been satisfied, there is no reason why he should be denied the right. His return of no property found is not necessary, because, as between himself and the mortgagor, his claim is purely equitable.

What remedy has the appellant if he is not permitted to file his petition? His petition is dismissed because the appellant is a *lis pendens* purchaser. When the property is sold, the purchaser will hold, because the appellant is a *lis pendens* purchaser, and the appellee will be entitled to the proceeds for the same reason; so the inevitable result of the position assumed by counsel is, that appellant in such a case is without a remedy. As the law now exists, the plaintiff, Ballou, in the original action, was compelled to make those holding liens at the time of the institution of his action parties to it, and when they came to assert their claims, if invalid, any party acquiring an interest in the land may resist the recovery, whether before or during the pendency of the action, upon equitable grounds. The action of the court below is also sought to be maintained on the ground that the appellant's debt is not due, and therefore the right to ask the aid of the chancellor should be denied.

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There is no judgment asked for the appellant's debt, but the chancellor, in order to preserve the security given for the debt, is asked not to subject it to the payment of unjust demands, and when interposing the plea of usury that the debtor has refused or failed to make, if successful, leaves the appellee with a judgment for the amount to which he is legally and equitably entitled. The chancellor will always purge the claim of usury when the pleadings or proof show the transaction usurious. In other words, he will withhold a judgment for the usury, when disclosed by the record; and if usury exists in this case, he will sell the land for the sum found due, deducting the usury, and this he will do, although the debtor may refuse to make such a defense. (*Lochny v. Gregg*, 12 Bush; *Lee v. Fellows*, 10 B. Mon., 118.)

When the chancellor has subjected the property to its legal or equitable burdens, he has rendered complete justice to all the parties, and will not refuse the relief because the appellants' debt is not due. The remedy sought here may be regarded as provisional only. The parties having liens on the same land are all before the court, and when the insolvency of the debtor is shown, and the insufficiency of the land to satisfy all the alleged liens is conceded, the chancellor will have no difficulty, having jurisdiction of the parties and the subject-matter, in determining their respective rights.

A refusal to listen to this complaint would deprive the appellant of a valid subsisting lien, and give to the appellee a judgment for an alleged claim that has no existence in fact, or if so, is usurious.

Mrs. Hart may have had a knowledge that the appellee was enforcing an alleged lien on this land, and to the extent

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that he has such a lien she must submit; but to the extent that it has been satisfied or tainted with usury, she can ask the chancellor to purge it. The right of lien creditors to be protected is peculiar to the jurisdiction of courts of equity, and those having liens upon the common fund may inquire into the validity of claims asserted against it. The right of the appellee to recover his debt is unquestioned, but if usurious, the chancellor will purge it, and render a judgment enforcing this lien for the amount due the appellee, and this will be final as between these parties; nor would the chancellor render a personal judgment against Mrs. Grigsby, if it appeared that the debt contained usury, without deducting it, unless he had done so before the filing of appellants' petition. What judgment is the chancellor to render in such a case? He will certainly not enforce the payment of appellants' claim, because it is not due, but will determine what is justly due the appellee, and then render a judgment subjecting this property to its payment.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 72—EQUITY—MARCH 29, 1881.

Grotenkemper v. Bryson et al.

APPEAL FROM GREENUP CIRCUIT COURT.

1. There being no such devise of the interest given to his sons by the devisor as amounts to a charge upon the estate to pay appellant's debt, he has no lien upon the lands conveyed by the devisees to *bona fide* purchasers and mortgagees.

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2. The executor had no authority, express or implied, to bind the devisees by his acknowledgment of appellant's demand in writing, so as to subject the devisees to its payment.
3. Appellant's demand is barred by the statute of limitations.

P. J. DONHAM AND ED. F. DULIN FOR APPELLANT.

1. The debt due appellant from the firm of Brown, Bryson & Co. was alike the debt of the testator individually.
2. The remedy against a deceased partner is to treat the claim as the debt of the individual partners. (2 Redfield on Wills, chap. 10, sec. 40; 5 How., 133; Maxey v. Averill's ex., 2 B. Mon., 107; 19 Ala., 103; 3 Florida, 101; 2 Johns. Chy. Rep., 507; 19 Vermont, 292-300.)
3. The testator could release his estate from debts against it. (2 Wash. on Real Estate, book 1, chap. 14, p. 445; 5 Wall., 119-165; Sugden on Powers, 123; 1 B. Mon., 207; 3 J. J. Mar., 318; 4 Dana, 603; 2 Johnson's Chy., 614; 7 Paige, 401; Redfield on Wills, 207, 212; 16 N. Y., 257; 12 Bush, 520; 3 Dana, 186; Story's Eq. Ju., sec. 1245; Hill on Trustees, 503; 8 Iowa, 463; 7 Paige, N. Y., 421-7.)
4. All the devisees are estopped from denying the validity of the obligation given by the executor. (3 B. Mon., 353; Story on Con., 282; 1 Cowen, 290; 6 Cranch, 258; 9 Johnson, 310; 2 Ld. Raymond, 930; 1 Parsons on Con., 13; 15 N. H., 129; 4 La., 281; 14 Ills., 34; 7 N. H., 345.)
5. Davis had no power to sell the demand. (Story on Agency, 78; Smith on Cont., 246; 56 La., 617; 73 Ills., 415; 52 Miss., 585; 6 Rich., N. C., 406; 74 N. C., 588.)
6. The demand is not barred by limitation. (12 B. Mon., 408; 4 Mon., 36; 16 Mass., 429; 13 Gratt., 339; 16 B. Mon., 416; Angell on Lim., sec. 232; Story on Prom. Notes, secs. 69, 172; Moore v. Shepherd, 2 Duv., 132; Clay v. Clay, 7 Bush, 98.)

L. T. MOORE, B. F. BENNETT, AND W. H. WADSWORTH FOR APPELLEES.

1. The lands devised to the three sons are not chargeable with appellant's debt in the hands of purchasers and mortgagees. (White v. Prentiss, 3 Mon., 512; Simms v. Lovely, 14 B. Mon., 446; 2 Story's Eq., secs. 1130, 1131, 1132; Gen. Stat., chap. 44, sec. 8; *Id.*, chap. 113, sec. 23; Story's Eq., sec. 1127.)
2. Appellant's demand is barred by time. (Hopkins v. Stout, 6 Bush, 377; 6 Mon., 1; 4 Litt., 347.)
3. The taking the note of one partner merges the claim. (1 B. Mon., 20; 6 Bush, 404; 7 B. Mon., 597.)

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E. C. PHISTER FOR ROBERT JOHNSON, JAMES BRYAN, AND J. M. GAMMON.

1. There is no such charge upon the estate devised as affects purchasers and mortgagees who in good faith part with their money.
2. The executor, by his obligation, could only bind the assets in his hands.

E. B. WILHOIT FOR APPELLEES, JAMES OSENTON, &c.

1. The title of the devisees was intended to be and was complete upon probating the will of the devisor. (Story's Eq. Ju., secs. 1127, 1132; *Larue v. Larue*, 3 J. J. Mar., 160; 14 B. Mon., 357; Rev. Stat., chap. 106, sec. 23; Gen. Stat., chap. 113, sec. 23; *Barnard Chy. Rep.*, 78; *Smith v. Guyon*, 1 Bro. Ch. R., 86; 12 Wheat., 498; 3 Pick., 393.)
2. Davis had authority to take from John S. and J. V. Bryson the notes.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The distillery firm of Brown, Bryson & Co., of which William Bryson, sr., was a member, was indebted at his death, in May, 1869, to the appellant, Grotenkemper, a commission merchant, on an open account, in the sum of \$6,328.23.

In an action to settle the affairs and sell the property to pay the debts of the firm, its liabilities were ascertained to be \$20,553.10, and its assets \$15,100.

The commissioner reported with the other claims the appellant's demand against the firm.

And on the 30th of July, 1872, he assigned it, in writing, through an agent, to J. L. Bryson and James V. Bryson, and subsequently took from them, with personal security, three promissory notes of different dates and unequal amounts, embracing his demand, which he had assigned to them, against the firm, with interest at eight per cent. per annum after maturity.

J. L. Bryson executed the notes in his individual capacity, and as executor of William Bryson, deceased. But for the assignment of his demand, the appellant could have realized by proper diligence about three fourths of it out of the firm assets.

Grotenkemper v. Bryson et al.

William Bryson, sr., by his will, which was probated in June, 1869, devised to his wife and children a large real and personal estate, which was enough to pay all of his debts and leave to each of them a handsome patrimony.

The first clause contains the language upon the construction of which will depend the solution of the controlling question involved in this case.

It is as follows:

"It is my will and desire that my Springville property (being the one-fourth interest in the Springville distillery) shall be disposed of by sale as soon after my decease as it can be done profitably, for the purpose of paying my just debts: and I desire that my funeral expenses be first paid out of any money that may be on hand or due me for rent; but if this and the proceeds of the Springville property should not be sufficient to defray all funeral expenses and pay all just debts, *then my three sons, John L. Bryson, James V. Bryson, and William Bryson, jr., are to pay the remainder equally out of their respective interests in my estate.*"

The appellant, after he had prosecuted John L., James V., and William Bryson, jr., to insolvency in an action brought by him in August, 1875, on the notes they had given for his demand against the firm, instituted this action in equity on the 6th of December, 1875, for the purpose of subjecting to the payment of his demand against William Bryson, sr., deceased, as a member of the firm named—

1st. The lands devised to John L., James V., and William Bryson, jr.;

2d. The lands devised to the widow and two daughters; and

3d. To hold the devisees responsible to the extent of the estate devised to them.

Grotenkemper v. Bryson et al.

Several years before the institution of either the suit on the notes or this action the three sons had sold and mortgaged the lands devised to them for their value to innocent purchasers, who, with the executor and his sureties, and the devisees, were made defendants.

The devisor, by the language quoted, charged the interest generally of his three sons named with the payment of such of his debts as remained after the real and personal estate, specifically devised for the purpose of their payment, had been exhausted.

It is contended, in substance, that the will created a trust, and that the debts of the decedent are charged on the real estate devised to the sons, and that the purchasers and mortgagee, having notice of the trust and charge from the probated will, were bound to look to the application of the purchase-money in discharge of the trust.

It is a well-established rule of equity, that wherever the trust or charge is of a defined or limited nature, the purchaser must himself see that the purchase-money is applied to the proper discharge of the trust; but wherever the trust is of a general and unlimited nature, he need not see to it.

If a charge be made for the payment of debts generally, a *bona fide* purchaser is exempted from any obligation to see to the due application of the purchase-money. (Secs. 1127 and 1132, Story's Eq.)

The policy of the rule to require the purchaser free from fraud to see to the application of the purchase-money has always been questionable in any state of case. (Story's Eq., sec. 1135.)

And for the purpose of narrowing the rule, the legislature declared in section 23, chapter 113, entitled "Wills," General Statutes, "where lands are devised to be sold on special

or general trust, or are conveyed or devised to trustees or executors in trust to be sold generally or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase-money, unless so expressly required by the conveyance or devise."

In the case of *Sims v. Lively*, 14 B. M., this court used the following language :

"And where the obligation of the purchaser to see to the application of the purchase-money is not clearly indicated by the will, or other instrument of title, but is a mere matter of equitable deduction or inference from the instrument of title, it must of course be subject to be rebutted by equitable consideration of greater weight.

"And the recognized distinction, that where a will makes the payment of debts a charge upon land, a purchaser of the land will be bound for the application of the price, if the debts be scheduled, but if they be not scheduled, he will not be bound."

By the decisions of this court and the policy of the legislature upon the subject, we are convinced of the correctness of the rule laid down in the beginning of this paragraph.

There being no such devise of the interest given to the sons as amounts, in substance, to its devise to pay the debt of the appellant, he has no lien on the lands in the hands of *bona fide* purchasers from them.

And the evidence establishes that the purchasers and mortgagee acted *bona fide*, and concludes the first question made by the appellant's assignment of errors.

Can he subject the land devised to the widow and two daughters, or hold the devisees responsible to the extent of the estate devised to them?

Cheek v. The Commonwealth.

It is necessary to determine but a single point to answer both propositions.

The devisees pleaded limitation in bar of appellant's demand.

He relied upon the execution of the notes by John L. Bryson, as executor of the deceased, in avoidance of that plea.

The executor had no express or implied authority to bind the devisees by his acknowledgment of the demand and promise in writing to pay it, so as to subject the devises to them, or their value to its payment. His act could do no more than bind the estate in his hands as assets, if the heirs did not themselves object and interpose the plea of limitation which he thus sought to cut off.

And as more than five years and six months had elapsed from the period at which the appellant's account was stated, in November, 1869, to the institution of his action, it was barred by limitation. (Sec. 2, art. 3, chapter 71, General Statutes.)

The question of novation does not necessarily arise, and will not therefore be determined.

Perceiving no error in the judgment, it is affirmed.

CASE 73—INDICTMENT—MARH 29, 1881.

Cheek v. The Commonwealth.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. A person who sells in a house under his control pools upon horse-racing is punishable under an indictment for keeping a "disorderly house."
2. See opinion for definition of "gaming," and for the term "disorderly house."

79	359
94	361
79	359
98	638
79	359
100	3
79	359
116	846
79	359
116	846
79	359
131	815

Cheek v. The Commonwealth.

HUSTON & WEBSTER FOR APPELLANT.

1. If the appellant is punishable at all, it is under section 10, chapter 47, General Statutes. (West v. Commonwealth, 3 J. J. Mar., 641; sec. 3, chap. 29, Gen. Stat.; 15 Pick., 231; 6 Serg. & Rawle, 5; 3 *Ib.*, 273; 1 Rawle, 289; 5 *Ib.*, 64.)
2. The instruction given is error. (Smith v. Commonwealth, 6 B. Mon., 22.)

P. W. HARDIN, ATTORNEY GENERAL, AND C. J. BRONSTON, COMMONWEALTH'S ATTORNEY, FOR APPELLEE.

1. Pool-selling is no more nor less than permitting or inducing a bet on a horse-race. The pool-seller is simply a stake-holder.
2. Although not indictable under the statute for suffering gaming in his house, appellant is punishable for keeping a disorderly house at common law. (6 B. Mon., 23; Gen. Stat., chap. 47, sec. 11; Brown v. Watson, 6 B. Mon., 588.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Appellant was indicted for the offense of "keeping a disorderly house," the specification being that he, for gain, habitually sold pools upon horse-races, and habitually procured idle and evil-disposed persons to come to his house to buy pools, and to bet upon horse-races, to the common nuisance and annoyance of all good citizens. The evidence established that appellant sold pools upon races to be run in Kentucky and elsewhere, for which he received a commission in no way dependent upon the result of the race, and that there was no disorder or disturbance of any kind.

The court instructed the jury as follows:

"If the jury believe from the evidence, beyond a reasonable doubt, that defendant, in this county, and within twelve months before the finding of the indictment herein, did suffer and permit divers persons to habitually assemble in a house in the city of Lexington, and on Main street thereof, commonly called the 'Merchants,' in the occupation and under the control of defendant, and there engage in betting, winning, and losing money upon horse-races,

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they should find the defendant guilty, and fix his punishment at fine or imprisonment, either or both, in their discretion; otherwise, they should find the defendant not guilty."

The jury having found appellant guilty, and fixed his fine at two hundred dollars, judgment was entered accordingly, from which this appeal is taken.

The sole inquiry is, whether the simple act of selling pools in a house under the control of the person selling is punishable under an indictment for "keeping a disorderly house." A determination of that question involves the inquiry, first, is the act complained of punishable by statute? second, is it an offense at common law?

The statute denounces a penalty against one for betting at "any game or wager," for inviting or inducing another to visit a place where "gaming" is carried on, and for setting up or keeping any "faro-bank, gaming table, machine or contrivance used in betting or other game of chance."

Appellant could not be convicted under an indictment for the statutory offense of betting at a "game or wager," first, because he did not bet or wager anything; and second, because betting on a horse-race, although punishable under the statute against wagering, is not "gaming," and is not, therefore, within the statute against inducing another to visit a place where "gaming" is carried on. The method pursued by appellant in the sale of pools is not a "machine or contrivance used in betting." So there is no express statutory penalty against the specific act of selling pools.

A game is a contest of chance or of skill, where the party in whose favor the result appears wins or receives something by reason thereof which he would not otherwise have re-

Cheek v. The Commonwealth.

ceived, and for which he paid no consideration. Appellant's commissions were not dependent upon the result of any race in which he sold pools, nor did any element of chance enter into his compensation or in any way affect it. His fees were the same without regard to the result of the race or of the disposition of the pools.

But while it is admitted that the selling of pools is not, in terms, prohibited by statute, it is insisted that because its tendencies are evil, in that it encourages persons to violate the law against betting, the act of selling pools, without regard to the manner in which it is done, is within the common law offense of "keeping a disorderly house." In this we concur.

A disorderly house, in its restricted sense, is a house in which people abide, or to which they resort, disturbing the repose of the neighborhood; but in its more enlarged sense it includes bawdy-houses, common gaming-houses, and places of like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety. Nor is it essential that there be any disorder or disturbance in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts there done are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or by statute. The legislature must be the judge of what is injurious to public morals, and it having declared that betting on horse-races is immoral, it is as much an offense to invite or induce persons to habitually attend in a house for the purpose of violating the statute as it would be if the acts there done were forbidden by the common law. (Bishop on

 Ryan v. Doyle, &c.

Criminal Law, vol. 1, secs. 1106, 1107, 1111, 1119, 1135, and 1136; Smith v. Commonwealth, 6 B. M., 22; 12 B. M., 3, Wilson v. Commonwealth.)

Judgment affirmed.

CASE 74—EQUITY—APRIL 7, 1881.

79	363
117	480

Ryan v. Doyle, &c.

APPEAL FROM MASON CIRCUIT COURT.

1. The agreement between appellee Doyle and Hines and wife for the exchange of real estate, the note from the latter to the former to be delivered by him to them as part of the contract, extinguished the note and all liens resulting therefrom.
2. The note could not be assigned by the obligee to the obligors. It was paid by the contract between them.

STANTON & LARUE FOR APPELLANT.

The contract made between appellee and Hines and wife extinguished the note as though it had been surrendered to them and destroyed.

THOS. J. THROOP FOR APPELLEES.

1. Doyle retained a lien upon the land to secure the payment of the note. (Gen. Stat., 589.)
2. The talk about some new arrangement by which Doyle was to surrender to Hines and wife the note never was consummated.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellee, Doyle, in the year 1871, sold a small house and lot to Hines and wife for \$150.

One hundred dollars of which they paid, and executed to him their promissory note for fifty dollars, the remainder thereof.

In 1873 the appellees, Hines and wife, exchanged the house and lot with the appellant, John Ryan, for about thirteen acres of land he owned on Kennedy creek.

Ryan v. Doyle, &c.

They executed deeds to each other, and interchanged possession.

Some time thereafter, and before the institution of this action, Hines and wife sold the Kennedy creek land to Doyle in consideration of a house and lot near the town of Chester and the \$50 note above-mentioned.

Hines requested Doyle to keep the note for him until he should remove from the Kennedy creek land, whither he was going at the time of the request. He returned in a few days, and Doyle proposed to let him have for the note a strip of land, about thirty feet wide, adjacent to the lot he had sold to him for the Kennedy creek land. Hines accepted the proposition, and Doyle kept the note.

On the 9th of January, 1874, Doyle brought suit against Hines and wife on the note, and to enforce a lien upon the house and lot for which it was given, without making Ryan a party.

Hines and wife waived the service of summons, appeared, answered, and confessed judgment.

A decree was rendered directing Ryan's house and lot to be sold to pay the note.

So soon as he learned such a judgment existed, he appeared, and on his petition it was set aside.

His answer and the evidence show the state of facts above named, and the further fact that Doyle did not acknowledge his deed to Hines and wife until twenty days after the institution of the suit.

The court again decreed the sale of Ryan's house and lot to pay the note, and he has appealed from that judgment.

The first judgment was properly set aside at Ryan's instance, and the judgment appealed from is erroneous.

Ryan v. Doyle, &c.

The moment the bargain was completed between Doyle and Hines and wife, by which the former agreed to give the note and a house and lot to the latter for the Kennedy creek land, the note was paid, and the covenant embraced in it was complied with.

And the fact that Doyle held it at Hines' request did not prolong its existence as a contract, or resuscitate the dead obligation which was embraced in it, and which was discharged by the transaction. He was simply the custodian of the note for Hines.

The note was not assigned to Hines and wife, nor could it have been, because it was their own obligation, and possessed no quality that would render it assignable to them, and therefore they could not re-assign it to Doyle.

They could have compelled Doyle to surrender it at any time after the sale to him of the Kennedy creek land, and the subsequent sale of the thirty-foot strip of land did not operate to revive the note or its lien against Ryan's house and lot.

Doyle has a lien on the thirty-foot strip of land for the sum of \$50, the purchase price therefor, as against Hines and wife, unless there be other facts not shown in this record to avoid it.

Wherefore, the judgment is reversed, with directions to allow Doyle to amend his pleadings and enforce any lien he may have against the thirty-foot strip of land if he desires to do so, but to dismiss the action against Ryan.

Haggard v. Commonwealth.

CASE 75—INDICTMENT—APRIL 9, 1881.

Haggard v. Commonwealth.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

1. Jury commissioners are not bound to select negro jurors. All that the accused can claim is, that no citizen otherwise competent shall be excluded by law on account of race or color.
2. The proper way in which to take advantage of an irregularity in the summoning or formation of a grand jury is by motion to set aside the indictment, and if no such motion is made, the irregularity is waived. So also any irregularity in the summoning of a petit jury is waived by a failure to challenge the panel.
3. The right of a party to be tried by a jury selected without discrimination on account of race or color is a right which may be waived.

T. C. WINFREY FOR APPELLANT.

1. The statute prohibiting persons of color from serving on grand and petit juries is in conflict with the constitution of the United States, and indictments found under that statute are void.
2. The police judge before whom the writ of *habeas corpus* was returned had jurisdiction to hear appellant's complaint under the writ, and his action was final. (Civil Code, secs. 399, 400, 401, 409, 420, 422, and 423.)

JOHN G. CRADDOCK FOR APPELLANT.

1. Negroes being excluded by law from juries, both at the time appellant was indicted and at the time he was tried, the trial was illegal, and the police judge acted properly in discharging appellant from custody on the trial of the writ of *habeas corpus*.
2. The order of the circuit court filing the new indictment and requiring the defendant to give bond for his appearance was, in effect, an order setting aside the former judgment and verdict, and a quashal of the old indictment.

M. O. ALLEN FOR APPELLANT.

1. The law in relation to selecting jurors, as it existed at the time appellant was indicted and tried, was unconstitutional, and his trial was therefore illegal.
2. The reference of the case to another grand jury was an abandonment of the first indictment.
3. The state, like individuals, is estopped by acts done through her legally constituted officers or agents. (*Obrion v. Commonwealth*, 9 Bush, 334.)

Haggard v. Commonwealth.

4. The police judge had jurisdiction to try the writ of *habeas corpus*, and his action was binding on the circuit court. (Civil Code, secs. 399, 401, 416, 420, 421.)

R. F. SPENCER FOR APPELLANT.

1. Our statute prescribing the qualifications of jurors, as it existed at the time appellant was tried, was in conflict with the constitution of the United States, and his trial was therefore a nullity. (Constitution United States, art. 4, sec. 1; Gen. Stat., chap. 62, art 1; *Ib.*, article 3, sec. 2.)
2. The trial being a nullity, appellant is not estopped to resist the enforcement of the judgment by reason of his failure to object to the jury.
3. The police judge had authority to try the writ of *habeas corpus*, and having released appellant, there was no authority to again imprison him under the same indictment. (Civil Code, sections 416, 420, and 422.)
4. The order referring the case to another grand jury was a quashal of the first indictment, and put a stop to further proceedings under it.

Orally argued by P. W. HARDIN FOR APPELLEE.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellant was indicted, tried, and convicted in the circuit court for the offense of maliciously stabbing.

He prayed an appeal, which was granted, and sixty days were allowed him to file the record here.

Instead, however, of prosecuting his appeal, he sued out a writ of *habeas corpus*, and upon the hearing thereof, the police judge of the town of Burksville discharged him from imprisonment, and substantially vacated the judgment of conviction on the ground, which is agreed to have existed, that the grand jury that indicted, and the petit jury that convicted him, were composed wholly of white citizens who were drawn by the jury commissioners out of numbers from which negro citizens were excluded. The circuit court disregarded the action of the police judge, and ordered the judgment of conviction to be executed, and dismissed a second indictment against the appellant for the same offense, and he appeals from those orders.

Haggard v. Commonwealth.

But there is no appeal from the judgment on the verdict. The circuit court had jurisdiction of the person of the appellant, and the offense for which he was convicted.

And if he had, upon his arraignment, moved to set aside the indictment, it would have been the duty of the court on the facts disclosed to have sustained the motion. And we must presume the court would have discharged its duty.

Section 158, Criminal Code, authorizes a motion to set aside an indictment for a substantial error in the summoning or formation of the grand jury. And this court has recently held that the jury commissioners should be allowed to select competent jurors from the whole body of citizens of the county, without regard to race or color.

But the commissioners, and the sheriff when he acts in their stead, are not bound to select negro jurors, simply because they belong to that race, any more than they are bound to select white jurors. And they are not required to select any particular person or class of persons for jury service, as neither race has a *right* to serve on a jury, but it is a *duty* which the state may require of them, as well as annex qualifications to the juror. The only right the citizen has relative to this subject is not to be by the law denied the possibility of selection on account of race or color, if he be otherwise competent.

The state has the power to establish the qualifications of jurors, and whether an unqualified juror belongs to one race or another, he has no right to be selected as a juror, and ought not to be selected.

The appellant did not move to set aside the indictment. And according to the principles laid down in the case of *Commonwealth v. Smith et al.*, 10 Bush, 476, he waived

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any error that may have existed, and which could have been reached by such motion.

He might also, by challenging the panel, have caused the exclusion of all the standing jurors from the trial jury under the provisions of sections 199 and 200 of the Criminal Code, for the same cause he now assigns for a discharge from his conviction.

But he did not avail himself of any of these provisions of law, which would have afforded him ample relief, had he but sought it, and he must, like any other citizen, be deemed to have waived the error in the formation of the grand and petit juries.

The question under consideration does not involve a constitutional right which the appellant was unable to waive—

1st. Because the court had jurisdiction of his person, and of the offense ;

2d. The laws of this state, as recently construed, are equal and uniform as to all citizens relative to the selection of jurors ; and

3d. There was a substantial and fair trial by a jury composed of persons possessing proper qualifications of jurors, although irregularly selected, on a good indictment, found by a grand jury similarly qualified and chosen.

The amendments to the constitution of the United States, in conferring civil rights and citizenship upon negroes, do not invest them with exclusive rights or privileges not accorded to other citizens.

And as the laws of Kentucky gave him the right to move to set aside the indictment, and to challenge the panel from which the trial jury was drawn, on the ground of irregular selection, and as he was afforded an opportunity to do so by

Anderson v. Arnold's ex'r.

the court upon his arraignment, he cannot, by invoking the power of the great writ of *habeas corpus*, through the instrumentality of a police judge, destroy the solemn judgment of a court governed by equal laws, possessed of ample jurisdiction, and where the error in the selection of the juries could have been corrected if it had been asked, and where the rights of the appellant have not been denied against his consent.

Wherefore, the judgment of the circuit court disregarding the usurpations of the police judge, and dismissing the second indictment, is affirmed.

79	370
94	435

79	370
112	854

CASE 76—ORDINARY—APRIL 12, 1881.

Anderson v. Arnold's ex'r.

APPEAL FROM HARDIN CIRCUIT COURT.

1. Shooting and wounding another is an assault and battery, although unintentional, and the action therefor dies with the person injuring or the person injured.
2. When the act complained of, and not the consequences of the act, causes the injury, the remedy is trespass and not case.

WILSON & HOBSON FOR APPELLANT.

1. An "assault and battery," within the meaning of chapter 10, section 1, General Statutes, is an *intentional* injury.
2. Under this statute, actions seeking compensation for actual injury done the person or the estate of the plaintiff, do not die with the person.

W. H. CHELF FOR APPELLEE.

1. This is an action for assault and battery, although the shooting is charged to have been unintentional, and the action died with the person who did the injury. (Gen. Stat., chap. 10, sec. 1.)

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2. For an injury which is immediate and not consequential, trespass is the proper remedy and not case, without regard to the motive of the wrong-doer. (1 Chitty on Pleadings, pp. 77, 101, 102, 151, 190, 191, 193; 2 Addison on Torts, sec. 788.)

HAYS & BUSH FOR APPELLEE.

The petition sets up no other cause of action than an assault and battery, which dies with the person. (Gen. Stat., p. 179; 3 Blackstone, 121; Bouvier's Law Dictionary, "Assault.")

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Section 1 of chapter 10, General Statutes, provides: "no right of action for personal injury, or injury to real or personal estate, shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative or against the personal representative, heir, or devisee, in the same manner as causes of action founded on contract."

The appellant, James Anderson, instituted his action in the Hardin circuit court, in which he alleges that on the — day of —, in the year 1878, the appellee's testator negligently and recklessly, *but not intentionally, inflicted a wound upon the body* of the plaintiff (appellant) with a pistol; in other words, that the appellee's testator shot the plaintiff with a pistol, causing him great pain and bodily suffering, and for which he asks a judgment, &c.

On the hearing of the cause, a demurrer was filed and sustained to the petition on the ground that the cause of action died with the person, and no action could be maintained against Arnold's personal representative.

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Counsel for the plaintiff proceeded upon the idea that the injury must be intentional in order to constitute it an assault and battery, and if involuntary, the remedy was by an action on the case: as if A shoot at B and wounds C, the shooting of C being unintentional, is not an assault and battery on C, but the result of an assault on B.

The various statutes authorizing actions by the widow, heirs, and personal representative of one whose life has been lost by the negligence of another are not involved in the question presented in this case, and there is no reason why the court should depart from the common law rule in defining what constitutes an assault and battery, although the appellant may have sustained great injury. The action of trespass lies for injuries committed by force, and generally are only for such as are immediate. (Chitty's Pleadings, vol. 1, p. 190.)

When the act complained of, and not the consequences of the act, causes the injury, the remedy is trespass and not case. "Nor," says Chitty, "is the motive, intent, or design of the wrong-doer towards the complainant the criterion as to the form of the remedy; and it is clear that the mind need not in general concur in the act that causes an injury to another; and if the action occasion an immediate injury, trespass is the proper remedy without reference to the intent." (Chitty's Pleadings, vol. 1, p. 147.)

When on uncocking a gun, it went off and accidentally wounded a bystander, it was held that the action was properly brought in trespass. So when the defendant, in firing his musket, accidentally wounded the plaintiff, trespass and not case was the remedy.

The familiar illustration given in the elementary books as to the distinction between trespass and case settles the

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question here. When a log is thrown in the highway, and in the act of throwing it strikes one, it is a trespass; but if, when placed in the highway, one is injured by falling over it, case is the proper remedy. So of the lighted squib that was thrown in the market space, and afterwards thrown about by others in self-defense; the new impetus given to it by others was held to be a continuance of the original force, and trespass was the remedy. Following, therefore, this common law definition, it was an assault and battery committed upon the plaintiff, although the shot was fired at a third person; and the meaning of the words *assault and battery* will not be restricted to an actual and intentional beating of another so as to authorize the recovery. If an assault and battery at common law, the action does not survive, and that it was there can be no doubt.

Judgment affirmed.

(Eden v. Lexington Railroad Co., 14 B. M.; Covington Railway Co. v. Packer, 9 Bush.)

CASE 77—ORDINARY—APRIL 20, 1881.

Harlan, &c., v. Howard, &c.

APPEAL FROM LEWIS CIRCUIT COURT.

1. The admissibility of ancient deeds does not depend upon the fact that the party producing them is in possession of the land in controversy.
2. A deed over thirty years old, unblemished by alterations, and produced by those whose custody affords a reasonable presumption that it is genuine, proves itself, the witnesses of the fact being presumed to be dead.
3. The credibility of the evidence contained in such deeds belongs to the jury.

Harlan, &c., v. Howard, &c.

4. There was sufficient evidence upon the issue to allow the case to go to the jury.
5. Section 62, Civil Code, has changed the rule in regard to possession of land lying in two counties.

B. F. BENNETT FOR APPELLANTS.

The court erred in refusing to permit appellants to read to the jury the deed from Keith to Harlan. It is more than eighty years old. (Harlan v. Seaton, 3 B. Mon., 312; Greenleaf on Ev., vol. 1, secs. 21, 46, 141, 144, 570; Hedges v. Ward, 15 B. Mon., 115; Bennett v. Runyan, 4 Dana, 423; 2 Bibb, 421; Bowling v. Ewing, 9 Dana, 77; Thurston v. Watson, *Id.*, 233; 6 B. Mon., 532; Burgen v. Chenault, 9 B. Mon., 7; Blight v. Atwell, 7 B. Mon., 267; Sharp v. Wickliffe, 3 Litt., 12; 5 Dana, 241; 6 Dana, 109; 2 B. Mon., 434; 4 *Id.*, 20.)

WADSWORTH, THOMAS & PHISTER FOR APPELLEES.

1. The bill of exceptions does not state that it contains all the evidence.
2. Possession of land in one county cannot be construed to give possession in another. (Herd v. Walker, 5 Litt., 22; Sowder v. McMillan, 4 Dana, 456; Roberts v. Long, 12 B. Mon., 195.)
3. There was no legal proof of the execution of the deed from Keith to Harlan, and it was properly excluded. (Howland v. Hardin, MS. Opin., 1876; 1 Greenleaf on Ev., 141; Cook v. Totten, 6 Dana, 109; Winston v. Gwathmey, 8 B. Mon., 21.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The judgment against appellants for costs of the continuance at the November term, 1876, was proper, because they were not ready on the day the case was set and called for trial, and the postponement until the next day, upon condition that they should continue the case at their costs, should appellees not be ready, was authorized, as the postponement was a matter of grace altogether.

It appears from the evidence that Seaton's heirs were in possession of a part of the Keith patent boundary, lying in Greenup county, and that Harlan's heirs recovered it from them in an action determined in 1859.

Thereupon Seatons surrendered their possession and claim to Harlan's heirs.

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Shortly thereafter the agent of appellants, who claim to be Harlan's heirs, placed several tenants in possession of portions of the Keith patent, lying in the county of Lewis, and settled himself on Montgomery creek, in that county, within the boundary of the patent, claiming the whole of it for the appellants.

Upon the trial, they offered to read a paper, purporting to be a deed from Keith to appellants' supposed ancestor, bearing date October 24th, 1794, in evidence as an ancient document.

The appellees objected, and it was shown by the evidence that this paper was seen by the witnesses as early as 1851, the year in which it was recorded in the clerks' offices of Greenup and Lewis counties, in which the Keith patent, a continuous body of land, lies, being partly in one and partly in the other county.

The same paper was seen several times thereafter in the suit of Harlan's heirs v. Seaton's heirs, and in the possession of appellants' attorneys.

After this testimony was heard, the court refused to allow appellants to read the paper as evidence, and they excepted.

It is contended by appellees that evidence of possession must accompany ancient documents to render them admissible evidence.

While it is true in the cases cited of Thruston, &c., v. Masterson, &c., 9 Dana, 233; Winston v. Gwathmey's heirs, 8 B. Mon., 20; and Cook's heirs v. Totten's heirs, 6 Dana, 109, in which deeds were admitted in evidence as ancient documents, there was more or less evidence of possession; yet we do not understand that the admissibility of such evidence depends upon testimony of accompanying possession of the lands claimed to be embraced by the deed.

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But where such instruments are over thirty years old, unblemished by any alterations, and are produced by those whose custody affords a reasonable presumption of their genuineness, they are said to prove themselves, the witnesses of the fact of execution being presumed to be dead.

It has been settled by the weight of authority that ancient deeds of conveyance of real estate are admissible without first requiring the party offering them to show acts of possession over the lands embraced by them. For until the court is made acquainted with the tenor of the instrument, the natural order of introducing the evidence would be reversed by requiring proof of corresponding possession.

The genuineness of such instruments may be shown by other facts as well as that of possession.

And when proof of possession cannot be had, it is within the very essence of the rule to admit the instrument where no evidence justifying suspicion of its genuineness is shown, and it is found in the custody of those legally entitled to it.

These principles are laid down and sustained by potent reasons in *Hewitt v. Cock*, 7 Wend., 373; *Jackson, d*, *Wilkins v. Lamb*, 7 Cowen, 431; *Barr v. Gratz*, 4 Wheat.; *Jackson, d*, *Lewis v. Laroway*, 3 Johns. Cas., 283; *Wilson v. Betts*, 4 Denio, 201; *McKenzie v. Frazier*, 9 Vesey; 5 Cowen, 223; and in sections 21, 141, 144, and 570 of *Greenleaf's Evidence*, vol. 1.

But we must be understood as applying these rules solely to the admissibility of the deed as evidence and not to the weight of the evidence it affords. The strength and credibility of the evidence belong to the province of the jury, as they may, even after the deed shall be admitted, be convinced of its want of genuineness from other evidence that

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may come in during the progress of the trial. This deed certainly was competent evidence, and the court erred in excluding it from the jury.

There was also enough evidence of the heirship of appellants, and of possession in Lewis county, to justify the court in allowing the case to have gone to the jury. But we refrain from analyzing the evidence on those questions, because a new trial must be awarded the appellants, and we do not, therefore, wish to express our views of its sufficiency or insufficiency.

The appellees contend that when a tract of land lies in two counties, possession in one does not give, or is not construed to give, possession in the other county.

Such was the effect of the decisions of this court in *Hord v. Walker*, 5 Litt., 22; *Sowder v. McMillen's heirs*, 4 Dana, 456; and *Roberts' heirs v. Long*, 12 B. M., 195; but section 62 of the Civil Code has altered that rule, and provides that actions for the recovery of real property, or of an estate or interest therein, must be brought in the county in which the subject of the action or *some part thereof* is situated.

And it follows, that although the Keith patent boundary may lie in the two counties; proof of title and the right to possession of any part thereof in Lewis county, where this action was brought, will sustain it to the extent of such proof, and also as to such parts of the boundary in Greenup county, connected with that in Lewis county, as to which the evidence may establish a like title and right of possession.

The corrected order showing the verdict and judgment thereon was entered before the motion for a new trial was disposed of, and we think it sufficiently clear that the mo-

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tion was intended to relate to that order, and the court so treated it.

The evidence by depositions for appellees, copied into the record, but not embodied in the bill of exceptions, or read to the court or jury, cannot be considered in determining the questions raised upon this appeal.

Wherefore, the judgment is reversed and cause remanded, with directions to grant appellants a new trial, and for further proper proceedings.

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88	368

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89	19

79	378
97	324

 CASE 78—EQUITY—APRIL 27, 1881.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The court erred in sustaining the demurrer to the petition.
2. The *fourth* clause of John W. Barrett's will creates a precatory trust in favor of appellant, Lillie Bohon, late Barrett. When she performed the requirements of the will, the executor had no discretion, but must pay to her the amount indicated by it.
3. The discretion given to the executor is only as to the mode of expending the money for her benefit, and settling it upon her.

F. T. FOX, W. LINDSAY, JAS. S. PIRTLE, AND E. F. TRABUE
FOR APPELLANT.

1. The fourth clause of the testator's will contains two requests of the nominated executor: 1. That he should take charge of, raise, and educate Lillie Barrett in his family. 2. That he should, out of the funds in his hands, expend for her or settle upon her ten thousand dollars. This request was not to be binding, unless she should be obedient to Thomas Barrett and his wife, conduct herself according to their wishes, and not to marry without their consent. These and the other conditions she has fully performed.
2. A trust is created imposing upon the executor the duty of paying appellant the amount mentioned in the will. (7 Jurist, 705; 1 Vesey, jr., 272; *Ib.*, 474; 11 Clark & Fin., 548; 2 Spence's Eq. Ju., 67; 3 Mac. & G., 546; 1 Perry on Trusts, 112; 1 Vesey, jr., 483;

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2 Phillips, 192; 5 Cl. & Fennelly, 129; 1 H. R., 82; 1 Sim., N. S., 357; 32 Beav., 144; 1 Keen, 317; 2 Sim., 644; 9 Vesey, 322; 24 Beav., 145; 16 Jurist, 492; 1 Ambler, 520; 2 P. W., 547; 8 L. R. Eq. Cases, 673; Wigram on Wills, part 2, 221; 66 Penn. Rep., 400; 1 N. H., 217; 2 Barr., 132; 20 Penn., 268; Collins v. Carlisle, 7 B. Mon., 14; Caldwell v. Caldwell, 7 Bush, 376; 7 Simons, 664; Barclay v. Dupuy, 6 B. Mon., 98; 98 Penn. St., 296; *Ib.*, 432; 20 Ohio, 550; 5 Beav., 241; 2 Bro. C. C., 38; 8 Vesey, 98 Mass., 279; 2 Gratt., 1; 2 Barr., 129; 13 Pa. St., 253; 1 N. H., 217.)

GOODLOE, ROBERTS & HUMPHREY, AND BRECKINRIDGE & SHELBY FOR APPELLEE.

1. It is clearly established that while trusts may be implied from the use of precatory words, the courts will limit rather than extend the doctrine of raising trusts upon mere words of recommendation. (1 McC. Chy., 397; 19 Conn., 342; 21 *Ib.*, 259; 18 Gratt., 541; 20 P. F. Smith, 153; 20 Penn., 268; 7 Wright, 445; 2 P. F. Smith, 219; Hill on Trustees, 68-93.)

The words must be imperative; the object and subject certain. (Perry on Trusts, 114; T. & R., 157; 3 Beav., 148; 2 Vesey, jr., 335; 8 *Ib.*, 380; 17 *Ib.*, 255; 98 Mass., 277; 1 Metcalfe, 445; 3 Humphrey 631; 15 Ala., 296; 35 Vermont, 173; 17 Mo., 166; 6 Jones' Eq., 27; 6 Simons, 568; 1 *Ib.*, 543; 2 *Ib.*, 267; 18 Beav., 272; 2 M. & K., 197; 26 Beav., 41; 1 Sim., 534; 27 Beav., 301; 19 Conn., 342; 18 Gratt., 541; 20 Penn., 268; 2 Barr., 129; 1 Harr., 253; 34 Beav., 513; 10 Sim., 1; 9 *Ib.*, 319; 3 Barr., 148; 5 Sim., 22; 35 Ves., 35; 1 Harr., 445; *Ib.*, 451; 4 Gray, 240; 2 Allen, 101; Leading Cas. Eq., vol. 2, 1842.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

John W. Barrett took Lillie Beeler, when she was but three years of his age, to his home, caused her name to be changed to Lillie Barrett, and adopted her.

From that time until his death he recognized and cared for her as his own child.

He was unmarried, childless, and owned an estate worth about \$15,000 when he died.

For several years before his death he and his adopted child Lillie were domiciled with his brother, the appellee, Thos. L. Barrett, whose estate is alleged to be worth \$200,000.

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Thus situated, he executed and published his last will and testament in this language:

"1st. I hereby appoint Thomas L. Barrett my executor, to execute this my last will, and I request A. J. Wood and Wm. J. Wood to give him the benefit of their advice so far as selling my real estate in Barren county, and in collecting what is due me in the counties of Hart, Barren, and Metcalfe, requires the same.

"2d. It is my will that out of the first means realized from my estate that he pay my just debts.

"3d. I desire that my executor shall, at such time, on such terms, and in such quantities as he may think best, sell all my real estate, of every kind, and wherever situated, and convey the same to the purchaser or purchasers by deed or deeds duly executed.

"4th. I devise all the residue of my estate, after the payment of my just debts, to my brother, Thomas L. Barrett, but it is my request of him (but not as a condition upon which this devise is to take effect) that he take charge of, raise and educate Lillie Barrett, who is now with me in his family, and that if she is obedient to him and his wife, Mary J. Barrett, and is governed by their advice and counsel, and conducts herself in such a manner as to merit the same, and does not marry without their consent and contrary to their advice, and she remains with my said brother and his wife, and is not taken from them, or does not voluntarily go away from them, or abandon their home, then I request him to expend for her benefit, in such manner, at such time, in such time, or to settle upon her in such way, at such time, and on such terms as he, in his judgment, may think her interest requires, the sum of \$10,000; but these requests are not to be legally binding upon him, but I desire to leave

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the same entirely to his discretion, and to make no requirement of him that would be legally binding upon him in a court of equity or elsewhere—it being my wish to leave the whole matter to his sense of right and discretion, he being fully advised of my wishes concerning the said Lillie, and also concerning the said sum of \$10,000, which I request him to use for her benefit on the conditions aforesaid, if he sees fit to do so, and the condition of his family is such that he can do so without embarrassment, but not otherwise.”

The executor, Thos. L. Barrett, took charge of, raised, and educated Lillie Barrett. She complied in every respect with the conditions of the will, and married without objection on his part.

The executor refused to expend, use, or settle upon her any sum for her benefit.

And she and her husband instituted this action to compel him to execute the alleged trust. A demurrer was sustained to the petition, and they have appealed.

The only question involved is the construction of the foregoing will.

The doctrine of precatory trusts is well established.

They grow out of words of entreaty, wish, expectation, request, or recommendation frequently employed in wills.

The meaning of the word precatory, according to its ordinary use, does not embrace a command—it means beseeching, suppliant, prayerful.

In its primal sense, as descriptive of an act relative to a right, it conveys the idea that the right is equivocal or uncertain, because it impliedly depends on the will of another, who is besought to exercise his power over it.

If such power were natural or independent of the testator, then no command of his to exercise it could be enforced;

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but where the power or discretion is created by will, it is subject to such limitations as the testator sees proper to impose, and whatever may be the character of the words which he uses to indicate his wish or will, whether preceptive or recommendatory, they are imperative—"the wish of a testator, like the request of a sovereign, being equivalent to a command."

His wishes and desires as to the disposition of his property after his death constitute *his will*. (Bent v. Herron, 66 Penn., 402.)

And although such desire is not expressed in mandatory language, yet if from the language used it can be inferred, with reasonable certainty, what the desire of the testator is, it will be treated by the courts as his commands, and executed accordingly. (Cary v. Cary, Sch. & Lef. Reports, 189.)

In section 112 of Perry on Trusts he says:

"Implied trusts are those that arise when trusts are not directly or expressly declared in terms; but the courts, from the whole transaction and the words used, *imply* or infer that it was the intention of the parties to create a trust. Courts seek for the intention of the parties, however informal or obscure the language may be; and if a trust can fairly be implied from the language used as the intention of the parties, the intention will be executed through the medium of a trust."

The authorities, both English and American, are conclusive, and in the main harmonious, that a trust will be created by such precatory words as "hope," "wish," "request," &c., if they be not so modified by the context as to amount to no more than mere suggestions, to be acted on or not, according to the caprice of the iname-

mediate devisee, or negated by other expressions indicating a contrary intention, and the subject and object be sufficiently certain. (Hill on Trustees, page 92, and authorities there cited; Perry on Trusts, chapter 4, notes and authorities cited; 66 Penn., 402; 1 N. H., 228.)

Many of the decisions are somewhat difficult to reconcile from their diversity in construing precatory words, but it will be noted that this springs from the difference in the order of expression and the surroundings, which are scarcely ever the same in two testators.

Hence necessity evoked the rule that "every case must depend upon the construction of the particular will under consideration." (18 Md., 165; 2 Vesey, jr., 634.)

The legal right to provide for the disposition of his property according to his own wish is unquestionable, and the only important point involved in the construction of this will is, has the testator by his words, viewed in their express and implied senses and according to all the light that the contexture of his will affords, shown how and for whom he desired his property disposed of after his death?

It is, in effect, insisted that the appellee took an absolute estate which vested immediately upon the death of the testator, and that this evidenced his intention not to create a trust in behalf of Lillie Barrett.

This position is untenable; for it is well settled that where a testator makes an *absolute* gift to one person, accompanying it with a request to appropriate a particular sum to the use of another, that the immediate devisee becomes a mere trustee to the extent of such sum. (1 New Hamp., 228; Hill on Trustees, side page 71; Bernard v. Muisheell, 1 John., 276; 7 Ben. Mon., 14.)

An absolute gift does not contravene either an express or implied trust annexed to the gift, nor can the fact that an absolute devise precedes the location of the trust words in the will throw any light upon their construction, as it is a common thing to invest the legal title and trusteeship in the same person, who is to receive the benefit in the event of the failure of the trust. And, in addition to these general considerations, the provisions of the will directing the sale of his real estate are inconsistent with an absolute devise to Thos. L. Barrett.

It is not reasonable to suppose that the testator would devise to him the absolute title to the whole of his estate, yet request two gentlemen to give him the benefit of their advice as to the sales of the real estate and the collection of debts, and require him to make such sales, when it appears that he is a man of good mind and excellent business qualifications.

Nor is it in accord with the actions of men, explained by daily experience, for one man to give certain property absolutely to another, and at the same time require him to sell and convey it "at such time, on such terms, and in such quantities as he may think best," when the absolute gift implies all of those powers and invests the donee with such discretion. Besides, he was directed to sell and convey as executor, and this demonstrates that he was not intended to be invested with title to the real estate as devisee.

It must therefore be concluded that the directions to sell left the *manner* of sale discretionary with the executor, and were precautionary provisions to turn his estate into money and cause it to yield its value for the purpose of meeting the contemplated trust he had at heart and in his mind, and which he created and delicately confided to his brother for

execution by the fourth clause of the will on the conditions therein named. The language expressive of his strong confidence, and the unfettered freedom with which he sought to invest his brother in the exercise of discretion about the conditions annexed to his request, taken in its literal and restricted meaning, might form a gauze over his intention; but penetrate beneath the letter, and you find his intention breathing securely within the fortress builded around it by the real significance of the body of his language.

What was uppermost in the purpose of John W. Barrett when he made this will?

He had so linked himself to the destiny of Lillie Barrett, who filled the places round and about him made vacant by his childless condition, as to cause him to entertain the tenderest affections for her.

He clearly designated her as the object of his bounty, plainly specified its character and amount, annexed the conditions upon which she, by her actions, might defeat it; constituted his executor the judge of her conduct; directed wherein it should be regulated by his views and wishes, and made provident preparation for the appropriation of the \$10,000, which he requested him "to use for her benefit upon the conditions aforesaid."

And the conclusion is irresistible that he, in the event of her obedience so plainly contemplated and carefully provided for, intended her to have the benefit of the \$10,000, if the condition of his executor's family should be such that he could use it for her without embarrassment.

The testator certainly never contemplated that the executor would attempt to disregard his request, and claim the \$10,000 himself, without the concurrence of a single broken

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condition upon her part, or the pressing necessities of financial embarrassment to drive him to do it upon his.

That he dedicated, upon conditions, two-thirds of his whole estate as the subject of the alleged trust, and charged his brother, to whom he devised the residue, with her maintenance and education, coupled with the fact that the brother did not need his bounty, furnish strong evidence of the purpose of the testator to create a trust in her behalf.

What else could he have meant by specifying the matters about which she was to be obedient, requiring of her years of submission to the control of Thos. L. Barrett and wife, and agreement with them in the formation of the sacred relation of marriage, hedging his bounty with a condition to prevent the interference of her kindred with the possession of her by his executor, and providing, in the event of her compliance with the enumerated conditions to the satisfaction of his executor, that he should expend the sum of \$10,000 for her benefit.

Is all of this meaningless? as certainly it must be if no trust were intended, because no sale of his real estate, nor advice of friends relative thereto; no rules for the conduct of Lillie Barrett; no discretion about her obedience or the manner of the investment "as her interest requires;" no protection from the burden in the event of financial misfortune; and no request to use the \$10,000 for her benefit on the conditions named were necessary if the executor were his sole devisee, and invested with the absolute title to all of his property, regardless of her obedience and consequent rights for the creation and preservation of which every sentence of the will was written, except less than four lines in the beginning of the fourth clause, and the provision for the payment of his debts.

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The text-writers say that no testator will refer at all to any matter that he had not greatly at heart. If this be true doctrine, almost the whole of the provisions of this will evidence the great solicitude of the testator for Lillie Barrett.

And there is a meaning in his aggregate expressions with reference to her and the subject he sought to devote to her use, which obtrudes itself upon the mind with such force that escape from its recognition is impossible.

The language employed in defining the discretion of his brother is somewhat obscure and indirect, resulting from an attempt by the testator to maintain throughout his language a refined respect for his feelings, amounting almost to sentimentalism.

A peculiar and sacred confidence must be presumed to have existed between them.

It is shown by the courteous language in which the testator limits the exercise of his brother's discretion to the performance of the conditions upon her part; the manner of the appropriation of the \$10,000 for her benefit; when and how the real estate should be sold; and to the condition of his family and finances when the period of application to her use of the \$10,000 should arrive.

These matters were left entirely to his discretion. Courts were excluded, and "*his sense of right and discretion*" trusted alone because he was "*fully advised*" of the testator's "*wishes*" concerning "Lillie and the said sum of \$10,000."

He confided the fullness of his wishes alone to his brother. Judging from the provisions of the will and the circumstances of the testator, those wishes must have been of the kindest character for her.

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It requires no romantic stretch of the imagination to account for the use of general terms and the non-expression of the particulars of the delicate confidence of brothers born of the same mother, reared around the same fireside, and in manhood associated under the same roof until one is taken and the other left.

And in view of their relations and the peculiar language of the will, which exalt this trust so high above the usually guarded trusts, the slightest wish of the testator should be binding upon the conscience of his brother.

The terms "if he sees fit to do so," "I leave it to his sense of right," "entirely to his discretion," must be regarded as the expressions of unreserved confidence in his brother's honor and discretion.

And construed in connection with the *thrice repeated request* to expend the sum of \$10,000 for her benefit on the specified conditions, they appear to have been used to untrammel as far as possible the exercise of his discretion, which he must use to comply with, but not to defeat, the wishes of the testator.

The discretion was not intended to be arbitrary. Those terms do not relate to his power to make or not to make the expenditure according to his own caprice. In such a case as the present, where the utmost freedom is conferred in the exercise of the discretion, it is clear a court of equity would interfere and control the discretion where it is abused, abandoned, or refused to be exercised.

Such a discretion as is here conferred does not authorize the person invested with it to act "according to his arbitrary will." (*Rose v. Stuyvesant*, 8th John., 426; 8 Mass. Reps., 40.) It is in law a sound discretion, and he could no more abuse or corruptly refuse to exercise it and keep the \$10,000,

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because he is in terms exempted from judicial control, than if the courts were expressly requested to compel him to execute the trust.

It appears with certainty that Lillie Barrett is the object of the trust; that its subject is the \$10,000 which the executor is requested to "expend," "settle upon," and "use for her benefit." And it is scarcely less certain that the language used by the testator creates a precatory trust which is not so limited by any of the terms employed as to leave its execution to the whimsies or inconstancy of the appellee.

Wherefore, the judgment is reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Judge HINES dissenting.

CASE 79—ORDINARY—APRIL 30, 1881.

Hayman & Co., &c., v. Hallam.

APPEAL FROM CAMPBELL CIRCUIT COURT.

1. Where a bond has been executed for the forthcoming of property taken under attachment, and the property is not more than sufficient to satisfy the prior liens upon it, subject to which the attachment was levied, the obligors in the bond are liable for nominal damages only for their failure to produce the property.
2. Although the obligation may be "to satisfy the judgment and deliver the property," it should be construed as if the disjunctive conjunction were used, as found in section 214 of the Code.
3. To enable a defendant to have a judgment by default set aside on the ground of surprise, he must present a sufficient defense to the action.

JESSE ARTHUR AND A. DUVALL FOR APPELLANTS.

As the property attached was not more than sufficient to satisfy the prior liens upon it, appellee was not damaged by the failure of ap-

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pellants to produce the property. (Civil Code, secs. 214, 216, 221, and 222; *Bell v. Western River Improvement and Wrecking Co.*, 3 Met., 558.)

WM. LINDSAY FOR APPELLEE.

1. As the answer of appellants was fatally defective, the court properly refused to set aside the judgment to permit it to be filed.
2. The fact that the attached property was barely sufficient to satisfy the execution liens upon it does not release the appellants, as they undertook that the judgment of the court should be performed, and that the attached property or its value should be forthcoming. (Civil Code, secs. 214, 216, 221, and 222.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee, Hallam, instituted his action against Hayman & Co. on a note for \$500, with several credits indorsed, and obtained an attachment that was levied on the property of the latter.

At the time the attachment was levied, executions were in the hands of the officer that had been previously levied, and prior liens thereby acquired. The appellants, Hayman & Co., executed a bond, with their co-appellant Arthur as surety, conditioned that the defendant shall perform the judgment of the court in the action, or have the property or its value forthcoming subject to the order of the court.

A judgment was rendered on the note, and the attachment sustained. After the judgment, and during the same term at which the court rendered the judgment, the appellants appeared and moved to set aside the judgment on the ground that their attorney employed to defend was too unwell to attend the court on the day the trial was had, a fact unknown to defendants, and tendered an answer, alleging, in substance, that the appellants, Hayman & Co., were in embarrassed circumstances, and their creditors, the appellee among the number, had agreed to release them upon the payment of a certain part of their indebtedness. This

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agreement is filed, and shows that the release by the creditors was conditioned on the fact that the appellants would obtain the signatures of the creditors representing eighty per cent. of their indebtedness to the agreement. This condition precedent was not complied with by the appellants, or at least no averment of its performance is alleged in the petition. The court, therefore, acted properly in refusing to disturb the judgment or the order sustaining the attachment on the affidavits filed, as no defense was interposed.

A rule was awarded against the appellants and the surety on the forthcoming bond to show cause why they should not pay the money into court, or have the property forthcoming to satisfy the judgment. They responded to the rule, alleging the existence of the prior liens on the attached property; that it had been sold to satisfy those liens, and brought its full value, and insisted that their liability by reason of the bond was merely nominal.

The response was held insufficient, and the rule made absolute, and an attachment awarded. This is also an error complained of, and we think requires a reversal. The levy of the attachment shows the existence of the liens by the execution, and if the property was not sufficient in value to satisfy such liens as had preference over the attachment, there was no reason for making the parties liable on the bond to a greater extent than the cost incurred.

If the property had been delivered into the custody of the court, and directed to be sold, the sale would necessarily have been made subject to the liens existing upon it, and if the property was not sufficient in value to more than satisfy those liens, the attaching creditor has not been injured. The obligation to deliver the property certainly exists, but if by

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reason of the failure to do so the plaintiff has not been injured, the damages should be nominal only. If there had been a mortgage on the property when delivered, the court would have directed the mortgage to have been first paid, and if it required the entire value of the property to pay that lien, the creditor would get nothing.

In this case the return on the attachment shows that it was levied subject to the prior liens, and they must be first satisfied. The obligation to satisfy the judgment *and* deliver the property should be construed as if the disjunctive conjunction had been used as found in the 214th section of the Code. Such was not only the intention but the proper construction of the stipulations of the bond, and it would be extremely technical to hold otherwise.

The original judgment must stand, but the proceedings under the rule by which it was made absolute is reversed, and cause remanded, with directions to permit the response to be filed.

CASE 80—EQUITY—MAY 5, 1881.

Cooksey, &c., v. Cassidy, &c.

APPEAL FROM CALDWELL CIRCUIT COURT.

1. A trial in chancery is not ended until final judgment is recorded, and under Myers' Code, which provided that exceptions to the competency of depositions might be filed at any time during the progress of the trial, such exceptions were in time, although not filed until after the court announced its conclusion from the bench.
2. In the absence of an objection to the filing of the exceptions, appellants cannot complain of the action of the court in permitting them to be filed.

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GEO. W. DUVALL FOR APPELLANTS.

Exceptions to depositions should be in writing, and filed before the beginning of the trial. As the written exceptions in this case were not filed until after the trial began, they should not have been considered. (Thompson v. Porter, 4 Bibb, 70; Bronson v. Green, 2 Duvall, 234; Civil Code, sec. 586.)

S. MARBLE & SON FOR APPELLEES.

The recording of the judgment and not the announcement by the court of its conclusion was the ending of the trial, hence the exceptions to depositions were filed in time. (Myers' Code, sec. 651.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

On the hearing, counsel for appellees orally announced that he excepted to certain depositions taken by appellant, on account of interest on the part of the deponents, and after all the depositions had been read, and after argument of counsel, the court announced from the bench its conclusion in conformity to the judgment appealed from, whereupon counsel for appellees filed written exceptions to the depositions, specifying the grounds of interest, which exceptions were sustained by the court, exceptions taken at the time to the ruling of the court, and thereafter the judgment appealed from was entered of record. At the time the depositions were taken, which was prior to the act making persons interested in the result of an action competent, the persons whose depositions were excepted to were not competent witnesses, and the ruling of the court was therefore correct, but the complaint is that the verbal exceptions amounted to nothing, and that the written exceptions came too late. Under Myers' Code, which must apply here, because the action was in progress when the Code of 1877 was adopted, exceptions to competency might be filed at any time during the progress of the trial, and the party offering the evidence had the right to require the court to pass upon the exceptions before rendering or entering final

Cooksey, &c., v. Cassidy, &c.

judgment on the merits. No request of this kind was made of the court, so far as the record shows, but appellants contented themselves with an exception to the ruling sustaining the exceptions, as appears from the judgment. After the final judgment was entered, counsel for appellants filed grounds and moved for a new trial, complaining that the written exceptions were not filed until after the argument of counsel, nor until after the court had intimated what its judgment would be, and that he was thereby taken by surprise. As the exceptions might at any time during the trial be filed, and the court has full control over such matters until the judgment is entered, and as counsel might have required the court to pass upon the exceptions at the time they were filed, and before the judgment was entered, as well as he could have done if they had been filed earlier, we see no reason why the court should have granted a new trial on the ground of surprise. Counsel must have known of the right to file the exceptions at any time during the trial, and of his right to have the court pass upon them before entering judgment; but even if it be conceded that the exceptions came too late because not filed before the depositions were read and argument heard, appellants cannot complain because the record does not show that counsel objected to the filing of the exceptions or to their consideration by the court. There is nothing but an exception to the ruling of the court on the exceptions.

Campbell, &c., v. Campbell's trustee, &c.

CASE 81—EQUITY—MAY 28, 1881.

Campbell, &c., v. Campbell's trustee, &c.

APPEAL FROM MADISON CIRCUIT COURT.

1. The husband did not pay any part of the purchase price for the land, but the whole of it was paid by the wife with the proceeds of her land and distributable share in her father's estate, the husband agreeing that the title should be made directly to her.
2. Failing to have the title made to her, his conveyance afterwards to Campbell, and the conveyance of the latter to the wife, will be upheld in equity against the husband's creditors.
3. The contract between the husband and wife was post-nuptial, in which the husband became the trustee for his wife for a meritorious consideration.

R. M. & W. O. BRADLEY FOR APPELLANTS.

The lands of the wife having been sold under an agreement with her husband that its proceeds should be invested in a larger and more valuable tract, and the deed be made to her, and the money having been so invested, and the husband having, without her knowledge or consent, taken a deed to himself, a trust thereby resulted to her; and the husband having thereafter invested her with the title, in order to carry out the former agreement, the same should be upheld against the husband's creditors. (Sec. 19, p. 587, General Statutes; *Mallory v. Mallory's adm'r*, 5 Bush, 464; *Miller and wife v. Edwards, &c.*, 7 Bush, 396; *Pribble v. Hall*, 13 Bush, 61; *Latimer v. Glenn, &c.*, 2 Bush, 544; *Story's Eq.*, vol. 2, sec. 1377a.)

C. F. & A. R. BURNAM FOR APPELLEES.

1. The attempted voluntary conveyance by Samuel L. Campbell through his brother to his wife is void as to the debts created before the execution of the deeds. (*Hurd v. Courtney*, 4 Metcalfe, 143; 5 J. J. Mar., 551; 3 Dana, 513.)
2. Not having been recorded in the proper clerk's office in the time required, the deed cannot be used against L. D. Campbell's creditors without proof of its execution. (2 Litt., 237; 4 *Ib.*, 272; 4 Paige, 65; *Ib.*, 74; 6 *Ib.*, 366; 8 *Ib.*, 161; *Whitesides v. Dorris*, 7 Dana, 101; 8 B. Mon., 529; *Latimer v. Glenn*, 2 Bush, 543; 4 Bush, 37; 3 Md., 1; 1 Met., 34.)

CHENAULT & BENNETT FOR DENNY, LANCASTER NATIONAL BANK, AND JNO. M. CAMPBELL.

1. The money which paid for the land was, according to law, the property of Samuel L. Campbell by virtue of his marriage with appellant.

Campbell, &c., v. Campbell's trustee, &c.

2. The deeds from the husband to his brother, and from him to appellant, were voluntary, fraudulent, and void.
3. The deed from Campbell to Bronston, trustee, for his creditors, was recorded eighteen days before the deed from S. L. Campbell to his brother was recorded.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

At the time the appellants, Josephine Campbell and S. L. Campbell, intermarried, the latter was possessed of considerable estate, and was thought to be solvent by the community in which he resided, and his wife was the owner, by gift from her father, of a tract of land worth about \$4,000.

She agreed with her husband to sell her land, and invest the proceeds in another tract larger and more valuable than hers, lying in the same county, and contiguous to his lands upon which they resided, on the condition that the deed should be made to her.

In pursuance of that agreement, she united with him in the sale of her land, and the proceeds thereof were paid for the other tract, containing 131 acres, to the vendor, Denny, who, although he knew the source whence he was being paid, made the deed to her husband without her knowledge or consent.

The price agreed to be paid for the tract purchased from Denny was \$7,800, the remainder of which was paid out of her distributable share of her deceased father's estate before any part thereof came to the hands of herself or her husband.

Denny being the administrator of her father, retained of her distributable share enough to pay the residue of the purchase price, and they executed to him their joint receipt therefor, which was charged to her in his fiducial settlement.

Some six months after the deed was made by Denny to her husband, she discovered the condition of the title, and

Campbell, &c., v. Campbell's trustee, &c.

complained of the wrong that had been done to her; and about two months thereafter her husband conveyed the 131 acres, in consideration of one dollar, to Alexander Campbell, who, upon the same day, executed a deed therefor to the appellant Josephine.

All of said deeds were either recorded or lodged for record before the institution of this action by her husband's trustee to ascertain assets and pay debts to the extent of his property, which he had assigned for the benefit of his creditors.

It appears that the husband did not pay any part of the \$7,800, but the whole of that sum was paid by the wife with the proceeds of her land and distributable share. It therefore follows that her equity is superior to the equity of his creditors, and unless some inexorable legal rule can be interposed to defeat her claim to the 131 acres of land, justice demands that it should not be taken from her for their benefit.

She neither consented nor acquiesced in making the title to her husband, and her conduct is without fraud, and free from any just suspicion of dishonesty.

And this court has held, in the case of Miller and wife v. Edwards, &c., 7 Bush, 397, the facts of which are analogous to this case, that "such a contract as that made with her husband before her land was sold is valid and enforceable as between the parties to it, as a prudent mode of preserving her estate against his improvidence or capricious power."

This principle of law seemed to be so well established that the court said in that case, it "now requires no citation of authorities in its support."

Campbell, &c., v. Campbell's trustee, &c.

The case of *Wickes v. Clarke*, 8 Paige, 161, cited by appellees' counsel, does not sustain their petition, but, on the contrary, it is in accord with the doctrine above quoted.

The vice chancellor said in that case, intentional fraud must appear to render void a voluntary settlement, even as to creditors whose debts existed when the deed was made. He very properly distinguished this class of cases from the ordinary case of a husband making a settlement of *his own* property upon his family under similar circumstances, and then went on to say, "with respect to both real and personal property which comes to the wife by gift or inheritance, and in which the husband gains an estate or interest in law by virtue of the marriage, the *wife's equity*, as it is called, entitles her to a settlement which this court will invariably enforce in favor of the wife, and even the children of the marriage, against the husband and all claiming under him, such as assignees or creditors, especially whenever they are obliged to seek the aid of the court to reach the property." (Clancy, 440.)

The chancellor concurred in the conclusions of the vice chancellor, except so far as he upheld the conveyance of the husband's interest as tenant by the curtesy initiate.

Such an interest being his absolute property, independent of his wife, and subject to his debts by the laws of New York, could not be voluntarily parted with to the prejudice of antecedent creditors.

But no such rule can prevail in Kentucky, because section 2, article 2, chapter 52, General Statutes, provides: "The husband's contingent right of curtesy shall not be sold for, or otherwise subjected to, the payment of any separate debt or responsibility of his during her life." The husband's conveyance of such a right did not therefore prejudice his

creditors, who could not subject it to their debts in any event.

Nor does this case fall within that class of cases founded on parol antenuptial contracts which are in contravention of the statute of frauds. This is a post-nuptial contract, not prohibited by that statute, whereby the husband became the trustee of the wife for a commensurate and highly meritorious consideration, and the execution of the deed by him to Alex. Campbell, and by the latter to the appellant, Josephine, was, in effect, what a court of equity would have compelled him to do before he could have reduced her property to his possession by its aid. (Story's Eq., vol. 2, sec. 1377*a*.)

And his creditors, who have been "obliged to seek the aid of the court to reach the property," stand in no better attitude than he; and as this court said in the case of *Latimer, &c., v. Glenn, &c.*, 2 Bush, 545, "she having the legal title, with an equity untainted with illegality or fraud, cannot be disturbed." (*Aynesworth, &c., v. Haldeman, &c.*, 2 Duvall, 566, and authorities therein cited.)

The order of lodging the deeds for record, whether before or after the deed of assignment, does not affect the rights of the appellant Josephine, for the reason found in *Miller and wife v. Edwards*, where it is said of a state of facts nearly identical with those of this case, "even without any explicit stipulation, an available trust resulted by implication, unaffected by the statute of frauds or of *conveyances*."

And although a purchaser from the husband, while the legal title was in him, without notice of the trust and the wife's resulting equity, might hold the land against her, still a creditor who has not been misled or defrauded by any voluntary act of hers, and who fails to assert his claim

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before the completion of her legal title, cannot be preferred over her pure equity.

It is not necessary to review the other authorities cited, as they embrace quite a different state of facts from those disclosed by this record.

The judgment is therefore reversed, and cause remanded, with directions to dismiss the petition so far as it seeks to set aside the deed from Alex. Campbell to Josephine Campbell and her children, and for further proper proceedings.

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86 308

79 400
83 51
83 617

79 400
96 53

79 400
116 399

79 400
116 399

CASE 82—ORDINARY—JUNE 2, 1881.

Billington v. The Commonwealth.

APPEAL FROM BALLARD CIRCUIT COURT.

1. In all cases of suretyship, in order that the act of one may bind another as surety, such act must, according to the statute, be done under authority in writing.
2. Section 85 of the Criminal Code does not apply to this case.
3. The commonwealth is bound by the statute as well as individuals. No exceptions are made.

L. D. HUSBANDS AND C. H. THOMAS FOR APPELLANT.

1. By the plain terms of the statute there must be authority in writing to authorize one to bind another as surety. (General Statutes, chapter 22, section 20.)
2. Although appellant was present when his name was signed by an attorney, yet the statute was not complied with.
3. There is no exception made by the statute in favor of the commonwealth.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. The statute referred to applies exclusively to civil contracts. The word surety does appear in the whole chapter upon the subject of bail. (Secs. 73, 76, 77, 85, Crim. Code.)
2. Appellant is a principal and not a surety.

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JUDGE HINES DELIVERED THE OPINION OF THE COURT.

L. M. Billington being in custody charged with "ku-kluxing," was admitted to bail in the sum of \$300, with appellant as surety in the bond. On failure of the accused to appear and answer the charge, the bond was forfeited, and to a rule to show cause why judgment should not go on the forfeiture, appellant responded that he did not sign his name to the bond; that he did not make his mark to the signature appearing thereto, and that he never authorized any one in writing to sign his name to the bond. To this response a demurrer was sustained, and judgment rendered against appellant. It is agreed in the bill of evidence that appellant was examined as to his qualifications as bail, and that, in the presence of the judge who accepted the bond, he directed the attorney for the accused to sign his name to the bond; that the name was signed in the presence of appellant as directed, and that thereupon, and by reason of the execution and delivery of the bond, the accused was released from lawful custody.

Counsel for appellant insists that no liability attaches by reason of the execution of the bond, because of the failure to comply with section 20 of chapter 22 of General Statutes, which is as follows:

"No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing, signed by the principal; or if the principal do not write his name, then by his sign or mark, made in the presence of at least one creditable attesting witness."

The language of the section seems to be imperative, and without exception, that in all cases of suretyship, in order that the act of one may bind another as surety, such act

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must be done under written authority from the one held to answer as surety. Unless, then, the signature by the attorney, in the presence of appellant, and by his oral direction, can be construed to be the act of appellant, and not that of his agent, there appears to be no escape from the conclusion that appellant is not bound as surety on the bond. Why a thing done in the presence of the one directing it is any the less an act of an agent for his principal than if the act was done in the absence of the principal, and by his previous direction, is difficult to conceive. In either case the thing done is but the performance of a physical act which is in conformity to the will of the principal, and in all such cases the law seems to contemplate that the will of the principal shall not be made binding upon him unless it be expressed in writing. In other words, that the best and only evidence of the intention of the principal to bind himself as surety is the written authority from the principal.

The 85th section of the Criminal Code does not apply in a case like this, where the question is of execution or no execution of the bond. That section applies especially to the construction of the bond when its execution is not denied.

We think the court below erred in sustaining the demurrer to appellant's answer.

Wherefore, the judgment is reversed, and cause remanded, with directions for further proceedings.

Johnson v. The Southern Mutual Life Insurance Company.

CASE 83—EQUITY—JUNE 9, 1881.

Johnson v. The Southern Mutual Life Insurance Company.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The retention of Johnson's note by appellee as its property, after the request had been made that it issue a paid-up policy, was sufficient evidence of further grace, and a determination to demand the payment thereof.
2. Inasmuch as appellee did not notify Johnson of the forfeiture of his policy, and did not offer to surrender his note, he had the right to treat the action of appellee as a waiver of the forfeiture and a continuance of the credit extended to him for the premium embraced in part in the note.
3. In order to inflict a forfeiture, the Company is required to adhere inflexibly to the contract and its modifications, and they must not attempt to secure profits which may result from the variation of its terms and the inability of the assured to comply with the added or altered conditions.
4. The offer to surrender the original policy and the demand for a new and paid-up policy were made within a reasonable time.

D. M. RODMAN AND J. K. GOODLOE FOR APPELLANT.

1. We insist that appellee cannot forfeit \$600 by reason of the failure to demand a paid-up policy within thirty days after the note for \$107 was due. It cannot enforce a forfeiture for failing to pay the note and still retain it as its property.
2. The demand for a paid-up policy was made in a reasonable time. (*Montgomery v. Phoenix Mut. Ins. Co.*, 10 Bush, 64; 9 Dana, 151.)
3. The failure to pay the note at maturity did not render the note or policy void. (2 *Parsons on Cont.*, 677; 33 E. C., 38; *Chitty on Cont.*, 1092.)

BARRETT & BROWN FOR APPELLEE.

1. The assured should have surrendered the original, and demanded a paid-up policy within a reasonable time. (7 *Ins. Law Journal*, Ills., 23.)
2. The opinion of this court upon the former appeal is the law of the case. (*Davis v. McCorkle*, 14 Bush, 746.)
3. The case of *Montgomery v. Phoenix Life Ins. Co.* is not in point. There is no identity of condition in the two policies. (MS. Opinion in this case, March 14, 1878.)

79	403
91	353
79	403
92	435
79	403
102	88

79	403
109	631

79	403
117	30
79	403
119	167
119	266

79	403
136	396

Johnson v. The Southern Mutual Life Insurance Company.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

October 21, 1869, Jilson P. Johnson's life was assured by the appellee, the Southern Mutual Life Insurance Company, in the amount of four thousand dollars, to be paid to his wife, if she should survive him, within ninety days after notice and evidence of his death, "deducting therefrom the amount of all unpaid notes given for premiums or loans on this policy, and all deferred premiums."

The consideration for the policy was \$129.88, in hand paid, at its issuance, and of the annual premium of a like sum, to be paid on or before the 21st day of October in every year during the continuance of the policy.

It was stipulated that in case the assured failed to pay the annual premiums as they became due, the Company should not be liable to pay the sum insured, or any part thereof, and the policy should cease and determine.

The following provision is also contained in the policy:

"Provided, that if this policy shall become null and void by reason of the violation of any of the foregoing conditions, all payments made hereon shall be forfeited to said Company; *but if three or more full years' premiums shall have been paid hereon, a new and paid-up policy will be issued by said Company, upon demand thereof, within thirty days after the said forfeiture, for the equitable value of the original policy.*"

Johnson paid the annual premiums to October 21, 1874, covering a period of five years.

The Company loaned to him on each of the 1st and 2d annual premiums the sum of \$43.

For the annual premium due October 21, 1875, he paid \$22.88, and executed his promissory note on that day for

Johnson v. The Southern Mutual Life Insurance Company.

the residue of the premium, payable ninety days after date, with interest at eight per centum per annum until paid.

He failed to pay the note at its maturity, and on the 7th of February, 1876, he was notified by the Company that it claimed the forfeiture of his policy. During Christmas week, 1876, Johnson, through his agent, demanded a new and paid-up policy for the equitable value of the original policy, which he at the same time offered to surrender.

The Company refused to accept the original, or issue a paid-up policy.

Thereafter, on the 1st of February, 1877, Johnson and wife instituted this action to compel the Company to issue to him a paid-up policy.

They alleged substantially the facts above recited.

To the petition a demurrer was sustained, and upon their appeal the cause was reversed, the court, in its opinion, saying:

“We do not regard time as so much the essence of this covenant in the contract that appellant forfeits his right to a paid-up policy by a failure to apply within the prescribed time. He should, however, have surrendered the original, and demanded a paid-up policy within a reasonable time.”

The Company, on the return of the cause, filed an answer, relying principally upon the ground that the demand for a paid-up policy was not made within a reasonable time. Upon that issue, the court again rendered judgment against them, and Mrs. Johnson, her husband having died, prosecutes this appeal.

The execution of the note for \$107, and the extension of time for its payment beyond the day on which the annual premium was agreed to be paid for the year ending October 21, 1875, did not constitute a waiver of the forfeiture of

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the policy upon the part of the Company, but it was an agreement not to enforce the consequences of the forfeiture for ninety days after the period at which it was originally agreed the forfeiture should take place. (10th Bush, 314.)

But the assured was entitled to the policy, so far as the payment of the \$22.88 would carry it beyond the period for the payment of the whole premium for that year.

And the execution of the note only alters the time of payment of the annual premium for the year it was given; but its acceptance sheds considerable light upon the meaning of the clauses of the contract above quoted.

The expressed reservation of the right to deduct from the amount of the policy all unpaid notes given for premiums, evidences the supposed contingency that has happened in this case, that notes could be given for annual premiums, and collected by the Company after their maturity, either by deduction from the amount assured, or by suit thereon, so long as they remained unpaid and the property of the Company.

The appellee, upon entering up the forfeiture it claims, and giving notice thereof to Johnson, did not offer to surrender his note, but retained it long after demand had been made by him for a new and paid-up policy, and alleges in its answer that "said note is owned and held by defendant."

The retention of the note by the Company as its property was sufficient evidence of further grace, and a determination upon its part to demand the payment thereof after the request to issue the paid-up policy had been made.

It could not own the note and receive the benefit of the forfeiture also.

The right of the forfeiture results from the failure of the assured to pay the annual premiums at maturity, and when-

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ever the forfeiture is properly claimed, the note or promise to pay the premium ceases to rest upon any consideration, as the only consideration of the note or promise is its power to carry the policy, and that being destroyed by the forfeiture, leaves it *nudum pactum*.

By the express contract, the power of the note executed by Johnson to carry the policy beyond the annual period for the payment of premiums, was limited to ninety days, and it could have continued no longer had the Company notified Johnson of the forfeiture of his policy, and surrendered or offered to surrender his note and all claim thereto.

But as it did not do so, he had the right to treat the action of the Company as a waiver of the forfeiture, and a continuation of the credit extended to him for the premium embraced in part by the note.

While the right to forfeit a policy exists when the assured fails to pay his annual premium, still it is not recognized because of any inherent justice in itself, but solely on the necessity of prompt payment, arising from the nature of life insurance, and of the rights of others assured and mutually interested in the continued ability of the Company to meet its obligations. If the Company intended to insist upon the failure to demand a paid-up policy, either within thirty days or a reasonable time after Johnson's note became due, it should have returned his note, and released him from all obligation thereon. (14 Bush, 71.)

And in order to inflict the forfeiture, the Company is required to adhere inflexibly to the contract and its modifications, and to avoid attempting to secure profits which may result from the variation of its terms, and the inability or neglect of the assured to comply with the added or altered conditions.

Johnson v. The Southern Mutual Life Insurance Company.

It follows, therefore, that the right of the Company to claim the forfeiture for the year ending October 21st, 1875, was waived by the retention of Johnson's note, and no further right of forfeiture accrued to it until his failure to pay the annual premium, which became due October 21st, 1876.

As the Company gave him no notice thereafter that it would treat his policy as forfeited, it might well be questioned whether the Company could claim a forfeiture in this case, even without a tender of the original and a demand of a new policy by Johnson.

But regarding the suit begun by him and his wife on February 1st, 1877, as notice of the Company's assertion of the right to forfeit for the non-payment of the annual premium due October 21st, 1876, still the whole period between that date and the institution of the suit was but a little over three months, within which, during Christmas week, demand of a paid-up policy was made by Johnson's agent, and this, too, within two months and ten days after a forfeitable failure to pay had occurred.

And without adopting the former decision herein for a precedent in any other, but regarding it as the settled law of this particular case, we are of the opinion that an offer to surrender the original and the demand of a new and paid-up policy were made within a reasonable time.

Wherefore, the judgment is reversed, and cause remanded, for further proceedings consistent with this opinion.

Gano v. McCarthy's adm'r.

CASE 84—ORDINARY—JUNE 11, 1881.

79 409
102 459

Gano v. McCarthy's adm'r.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. The mere possession of a promissory note is not *prima facie* evidence of ownership as against the payee or his personal representative. The burden of proof is on the claimant to show that his possession is rightful.
2. That the party in possession of the note said at the time she assigned it that she had acquired it as a gift from the payee was not competent to establish the gift, nor as a part of the *res gestæ*.

MORTON & PARKER FOR APPELLANT.

1. Possession of a note is *prima facie* evidence of ownership, and a party claiming adversely to the holder must show that the possession is wrongful. (Carlyle & Offutt v. Patterson, 3 Bibb, 33; Speed's ex'r v. Nelson's ex'r, 8 B. M., 502; Crosthwaite v. Mizener, MS. Op., Dec. 18, 1877.)
2. The statement made to appellant by the holder of the note, at the time she assigned it to him, that she had acquired it as a gift from her uncle, was competent as a part of the *res gestæ*. (May v. Jones, 4 Litt., 24; Shackelford v. Smith, 5 Dana, 240.)
3. As there are facts in the case conducing to prove title in appellant's assignor, the court erred in giving a peremptory instruction for appellee.

BRECKINRIDGE & SHELBY FOR APPELLEE.

1. While the mere possession of commercial paper is *prima facie* evidence of ownership, such is not the rule with regard to non-negotiable instruments. The holder must show that he is rightfully in possession. (1 Daniel on Negotiable Instruments, secs. 741 and 812; Dorn v. Parsons, 56 Mo., 601; Central Bank v. Hammett, 50 N. Y., 159; Story on Bills of Exchange, secs. 415-16; Williams on Personal Property, side page 395; Brown v. Spofford, 95 U. S. (5 Otto), 478; Bradford v. Ross, 3 Bibb, 238; Bell v. Morehead, 3 A. K. Mar., 153; Crosthwaite v. Mizener, 13 Bush, 543; Welch v. Lindo, 7 Cranch, 159.)
2. If there was any proof of title in appellant's assignor, it was only an equitable title, upon which appellant could not recover in an action at law. (Daniel on Negotiable Instruments, secs. 604 and 741; Gannett v. Gault, 13 B. M., 390.)

Gano v. McCarthy's adm'r.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

In the year 1872 Samuel Devore executed and delivered his note to one Florence McCarthy for \$300. McCarthy died in the year 1875, and the payor, Devore, died shortly after. Mary Straughn, a niece of the intestate McCarthy, after the latter's death, assigned this note for a valuable consideration to the appellant, R. M. Gano.

The administrator of McCarthy, Tarlton, instituted this action against the administrator of Devore, seeking to recover the amount of the debt. Devore's administrator pleaded that the estate of his intestate was owing the note, and as the administrator, he was ready and willing to pay the debt, and tendered the money into court, and further alleged that the appellant, R. M. Gano, was in possession of the note, and claimed to be the owner. He asked that the parties be compelled to interplead, and their rights determined.

Gano came into the case by his petition, in which it is alleged that the note was executed by Devore to plaintiff's intestate, and by the latter, some time prior to his death, assigned to his niece, Mary Straughn, for a valuable consideration, or delivered as a voluntary gift, and that Mary Straughn, for its full value, transferred the note to him.

The issues being made and proof heard, the court instructed the jury to find for the plaintiff, and this is assigned as the principal ground for a reversal.

There was no assignment of the note by the appellee's intestate to his niece, and the only question is, was the possession of the note under the circumstances such evidence of ownership as required the jury to pass on the issue made? We think not.

Gano v. McCarthy's adm'r.

Here was an issue directly made as to the title and ownership of the note by the personal representative of the party to whom the note was executed and delivered. It is conceded by the pleadings and shown by the proof that the note was executed and delivered to the plaintiff's intestate, and his original title and possession being unquestioned, the burden was on the party claiming the note to show the manner in which his assignor secured title, and the mere fact of possession upon such a state of facts was not *prima facie* evidence of ownership.

That there might have been such a gift of the note, or a verbal sale of it, by the intestate to his niece, as to prevent a recovery by his personal representative, is not doubted; but such a defense must be sustained by the proof, and the law will not presume the existence of such facts from the mere possession of the note by the claimant as will deprive the owner of title. The presumption is, that the title and right to the possession is with the original owner, and the burden is on the claimant to show that his possession is rightful. The *party admitted to be the original owner* is not required to show, in addition to the title and possession in himself, that this possession he has been deprived of by the unlawful act of the defendant; but the explanation as to how the claimant derived title and possession is with the latter.

If the recognized rule of law applicable to the ownership of personal property is to be applied to a due-bill or non-commercial paper in the possession of the party claiming it, still the recovery in this case was properly denied. The possession of personal property is *prima facie* evidence of ownership; but where the party claiming to be the owner establishes his title, and the fact that he was in possession,

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and the party against whom he is seeking the recovery claims to hold under him, the mere fact of possession by the claimant is not such evidence of his possession being rightful as will prevent the recovery. It would be an easy matter to deprive the owner of his property, if in such a case he is required not only to make his action good by showing title in himself, but must, in some other manner than the exhibition of his title, negative the idea that the possession of the defendant is wrongful. A sues B for the possession of his horse, and proves the original ownership and possession, and B claims to have derived title by purchase or by gift from A; now in such a case it would be an extremely dangerous doctrine that would recognize the right of property in B by presuming a sale or gift from the mere possession alone.

In this case, the fact that the niece lived with the plaintiff's intestate at his death, and that he had no children, are not circumstances authorizing the conclusion that the note was given to her. There was no assignment upon it to the niece, and the transfer by her to Gano was after the death of the intestate, and no attempt to prove that she acquired it for a valuable consideration, or that it was given to her, other than the mere possession of the paper.

The exclusion from the jury of the statements made by Mary Straughn, at the time she assigned the paper to the appellant, is also assigned for error. The appellant offered to prove that, at the time when she assigned the note, she told him that she had acquired it as a gift from her uncle. It is not claimed that it was competent for the purpose of showing the gift, but that it was a part of the *res gesta*, and should have been admitted. If not competent to establish the gift, we cannot see how the appellant has been

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prejudiced by excluding it. That she claimed the note as belonging to her is clearly shown by the fact of her assignment and sale of it to the appellant, and that she had the possession of it at the time is admitted, and the only effect of the admission of such evidence would have been to mislead the jury.

The nature of her claim is fully set forth in her pleading, and that she claimed to hold the note in some other way is not pretended to be shown by the appellee; so there was no necessity for permitting the introduction of such proof to show the manner of her claim. The manner of her claim fully appears, and the only question is, does the proof sustain it.

This court, in the case of Gill v. Johnson's adm'r, 1 Metcalfe, decided that possession of a note by a party who was not the payee, and held it without assignment, was *prima facie* evidence of ownership. In that case there was no claim made by the real owner, and it was held upon a general traverse made for the non-resident defendant that the possession and production of the note was sufficient evidence of the plaintiff's equitable right; yet in that case it was said the plaintiff should have made the personal representative of the payee a party to the action. While the law presumes ownership of personal property by reason of the possession, this presumption may be destroyed by the facts of the particular case. Here is the naked possession of the note by a stranger, and a possession no doubt acquired in the best of faith; still it is urged that the party to whom the note was given, and to whom it was made payable and delivered, must be required to prove that he never assigned it to the party who has transferred it to the appellant. It may well be doubted whether the presump-

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tion of *bona fide* ownership from the mere possession should apply in a case like this.

In Daniel on Negotiable Instruments, section 812, in discussing the question of title from such possession, it is said:

"But the presumption of *bona fide* ownership does not apply where the instrument is not payable to bearer, unless it be indorsed specially to the holder or in blank." (See also *Bradford v. Ross*, 3 *Bibb*; see also *Bell v. Mitchell*, 3 *A. K. Marshall*.)

The holder, however, may waive the equitable right, and where that right is not controverted, or if denied is not negatived by the proof, under our system of pleading we do not see why this equitable right should not be adjudged from the possession and production of the paper. In this case it was proper to find for the plaintiff, and a verdict for the appellant could not have been sustained.

Judgment affirmed.

CASE 85—INDICTMENT—JUNE 11, 1881.

Evans v. The Commonwealth.

APPEAL FROM LAUREL CIRCUIT COURT.

1. The statute under which appellant was indicted is intended to punish a person who detains a female against her will for the purpose of having carnal knowledge of her, and to create an offense less than that of rape.
2. It was for the jury to decide upon the credibility of witnesses.
3. There is no error in the instructions.

W. H. RANDALL AND R. L. EWELL FOR APPELLANT.

1. The taking and detaining contemplated by the statute is the abduction or detaining where the wrong-doer actually takes or detains a woman against her will, having her completely under his control, with intent to have carnal knowledge of her.

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2. The instructions given against the objections are not the law. (Crim. Code, secs. 225 and 340.)

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. The whole argument of appellant's counsel is that the legislature did not mean what it plainly said. If the statute does not cover a case like this, it means nothing.
2. There is no error in the instructions.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The accused was indicted and convicted under the following statute: "Whoever shall unlawfully take or detain any woman against her will, with intent to marry such woman, or have her married to another, or with intent to have carnal knowledge with her himself, or that another shall have such knowledge, shall be confined in the penitentiary not less than two nor more than seven years."

This statute was evidently enacted to punish those who detain females against their will and consent, for the purpose of having sexual intercourse with them, and to create a lesser offense than that of rape, or an attempt to commit rape. The facts of this case have been passed upon by a jury, who were the sole judges of the guilt or innocence of the accused. He was tried by a jury of his neighbors or men of his county, and it is not to be presumed that, under the circumstances of this case, they have acted without proper deliberation, when the result of that action has been to convict the accused of a great crime. The testimony of the injured party is, that the accused overtook her on the road, riding in before her, and proposed to have sexual intercourse with her, and she refused; that he dismounted and took hold of the bridle of her horse, and wanted to take her off the horse, taking hold of her, and making the effort to pull her off. If this statement is to be believed, the accused is guilty, and was properly punished. It was with the jury

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to believe or discredit the statements, and knowing the parties, they have said the statements of this witness are true. An effort was made to destroy the effect of her testimony by showing that she had made conflicting statements in regard to the matter, and also to prove she had made certain statements without first laying the foundation for the introduction of such testimony, and this proof was properly excluded. Still various witnesses were introduced and sworn, who stated that this prosecuting witness had made different statements from those made under oath. Yet the jury credited her testimony, and this court cannot revise such action; and if the right existed, we are not prepared to say that the verdict was wrong. This statute was intended to protect females from such outrageous assaults, and the instructions given were as favorable for the appellant as the facts authorized.

Judgment affirmed.

CASE 86—PETITION EQUITY—JUNE 21, 1881.

Myer & Hay v. Dupont, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. Where a railroad company has contracted with a subscriber to its capital stock to apply the subscription to the construction of a particular part of its road, a contractor who has done the work on that part of the road under a contract with the company has no lien on the subscription to secure the payment of his claim, unless he has contracted therefor, and the president and directors of the company are not liable for the appropriation of the subscription to the payment of other debts of the company so long as the subscriber does not complain.

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2. If such a trust exists in favor of the contractor, he cannot enforce it without alleging that a sufficient amount to pay his claim remains in the hands of the company after constructing the portion of the road to which the subscription was to be applied.

D. M. RODMAN FOR APPELLANTS.

1. Appellants, by their contract with the railroad company, acquired an interest in the fund subscribed by the city of Louisville, and it was the duty of the president and directors of the company to apply the proceeds of that fund to the payment of appellants' debt, and for the fraudulent and willful violation of that duty they are liable to appellants. (Acts, 1873, vol. 1, chap. 192, page 248; 1 Chitty on Pleading, 136; Shakers v. Underwood, 9 Bush, 621; Lex. and Ohio R. R. Co. v. Bridges, 7 B. Mon., 556; Rowe v. Williams, 7 B. Mon., 204; Gratz v. Redd, 4 B. Mon., 191, 195; Percy v. Millanden, 3 La., 585; Garvin v. Mobley, 1 Bush, 48; Turquand v. Marshall, 6 Eng. L. R.; Robinson v. Smith, 3 Paige, 230.)
2. It was not necessary for appellants to allege that the entire sum subscribed by the city of Louisville had not been expended in the construction of the part of the road to which the city's subscription was to be applied, as that is entirely a matter of defense.

H. C. PINDELL FOR APPELLEES.

1. The act and ordinance relied on did not amount to a contract. The legislature had no power to make a contract on behalf of the railroad company. (Sage v. Dillard, 15 B. Mon., 340; C. & O. R. R. Co. v. Barren Co., 10 Bush, 610.)
2. The obligation required by the ordinance expressed no trust for appellants, and none can be implied, and if it could, it would be void for uncertainty. (Story's Eq., sec. 964; Stubbs v. Sargon, 2 Keene, 255; Knight v. Knight, 3 Beav., 148; Curtis v. Rippon, 5 Mad., 434; Leines v. Borden, 5 Fla., 72; Gilbert v. Chapin, 19 Conn., 342; Perry on Trusts, secs. 82, 83, 86, 114; Story's Eq., secs. 979a, 1156-7, and 1183; Baptist Asso. v. Hart, 4 Wheat, 29; Harland v. Trigg, 1 Bro. Ch'y, 144.)
3. Directors are not personally liable for violations of corporation trusts. (Angell & Ames on Corporations, secs. 31, 14; Story's Agency, sec. 269, *et seq.*, 302, *et seq.*, 276, 134, *et seq.*, 308, 452, *et seq.*, 319, 308, 310; L. & O. R. R. Co. v. Bridges, 7 B. M., 556.)
4. Directors are not liable for mistake as to a doubtful question of law. (2 Kent., 63, n. a.; Angell & Ames, sec. 314; Scott v. DePeyster, 1 Edwd. Ch'y, 534; Godbold v. Bank of Mobile, 11 Ala., 191; Overend v. Guernsey, 4 Ch'y App., 720; Turquand v. Marshall, *Id.*, 385; Sperenz's Appeal, 71 Penn. St., 17; L. & O. R. R. Co. v. Bridges, 7 B. M., 560.)

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

There is no question but the president and directors of the Elizabethtown and Paducah Railroad Company can be made individually liable for a fraudulent, and even for a wrongful or illegal appropriation of the corporate funds of the company. The question arises in this case, are the facts alleged in the petition sufficient to create such a liability. The subscription of one million of dollars made to the capital stock of the company by the city of Louisville was to be paid or realized by the issual of the bonds of the city, the bonds to be sold by the president and directors, and when sold the proceeds to be paid to the commissioners of the sinking fund of the city, and to be paid by these commissioners to the president of the company upon or for work in the construction of forty-five miles of continuous road, beginning at the city of Louisville. In other words, the money was to be paid as the work progressed, one half to be paid when the chief engineer certified that this much is due for work completed on the first thirty miles of the road, beginning at Louisville, and the other half to be paid upon a similar statement by the engineer that the same is due for work actually done on the remainder of the road; and if the amount so dedicated to the construction of either part of the road shall be more than is necessary for that purpose, it may be applied to the construction of other parts of the road. The company was also required to execute an obligation to the effect that the proceeds of the bonds would be thus applied, and in no event, as provided by the ninth section of the ordinance constituting the contract between the parties, was the subscription of stock to be subjected to the present mortgage of the Elizabethtown and Paducah road.

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The object of the city of Louisville was to secure the application of the funds subscribed to the construction of the road next to the city, and for this purpose the sinking fund commissioners were required to retain possession of the funds, and pay them out to the president as the work progressed, in the manner specified by the ordinance.

After this contract had been made by the company and the city, in pursuance of the act of February 18th, 1873, the present appellants entered into a contract with the railroad company, by which they undertook to construct two sections of the road within thirty miles of the city for \$68,000, to be paid them as the work progressed, the company retaining fifteen per centum of the amount actually due until their entire contract was completed. It is alleged that the company had in its possession a sum sufficient out of the proceeds of the bonds to pay them in full; that they had completed their contract, and there was still due them \$13,000; that it was the duty of the directors to have paid them out of this fund; but in disregard of that duty they had fraudulently and illegally taken the money, and paid it as interest on the old mortgage of the Elizabethtown and Paducah Railroad Company, not leaving enough to pay any part of the balance due the appellants. That the company had gone into bankruptcy, was insolvent, and the president and directors, by reason of their wrongful and fraudulent acts, were personally liable, &c. The contract made between appellants and the company is made part of the petition. This contract prescribes the manner in which the work is to be done, the mode of payment, &c., but contains no stipulation by which the proceeds of the bonds in the hands of the sinking fund commissioners are assigned to the appellants, or any lien given them on this fund to

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secure its payment. The city of Louisville is not complaining or a party to the action, nor is there any allegation that the road has not been completed, or the work done as agreed on by the company and the city; but, on the contrary, the legitimate inference from the facts stated is, that the road has been completed, and the proceeds of the bonds, or a part of them, applied in discharging the debts of the corporation. The contract between the city of Louisville and the appellees or the railroad company created no trust in favor of the contractors by reason of work done on this particular part of the road. It is true the fund belonged to the corporation, and when diverted from its legitimate purpose by the directors—that is, used for purposes other than the construction of the road, or in payment of debts due by the corporation—the directors would have been individually liable.

The appropriation of this fund to the construction of a particular part of the road was to secure the city of Louisville, and when the contract between the city and the railroad company has been complied with, the contractor has no right to complain. He may have contracted upon the faith that this fund would build the road the distance contemplated, and that the subscription would insure the solvency of the corporation; still he had no lien upon the fund or the right to demand that the money paid him by the company should come from the proceeds of the Louisville bonds.

These appellants were being paid monthly by their contract with the company, when the company was not entitled to receive any part of the proceeds of the bond, until work of the value of one half the proceeds had been completed on the first thirty miles, and work of the value of the re-

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maining half on another part of the road. So the appellants were being paid monthly until the work had progressed to its completion, and now they insist that one hundred and twenty thousand dollars of the proceeds of the bonds had been paid on the old mortgage executed by the company, and for that reason the president and directors are individually liable. The proceeds may have been invested in this way, and yet the company have paid out a much larger sum from its own pocket than the proceeds used in paying the mortgage debts.

If the appellants have a lien, or if there is a trust created by reason of their relation to the original contracting parties, no recovery can be had in the absence of an allegation that, after expending the amount of means subscribed by the city of Louisville in the construction of the road, they still had a sum sufficient left in their hands, or that had been appropriated to other purposes, to pay appellants' debt.

What is the difference between paying out the actual proceeds of these bonds and a sum equivalent to the proceeds? And if they had paid a sum equal to the Louisville subscription out of the company's pocket, why had not the company the right to pay off the mortgage if the sum realized was sufficient for that purpose?

It is not a violent presumption to say that the road had been constructed by the company, or the contract complied with; and when the city had been satisfied, the appellants were no more beneficiaries of the fund than any other contractor on the road. As creditors of the company, they were interested in having the funds of the corporation applied to the payment of the corporate debt, and when this fund has been misapplied the directors are liable.

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In the case of the Shakers v. Underwood, an officer of the bank had misapplied the funds belonging to the depositor by converting them to the bank's use. So in this case: if the money of the corporation is converted by the appellees in the payment of their own debts, or in the construction of some other public improvement, a liability would exist; or, as in the cases of Gratz v. Redd, 4 B. M., and L. & O. R. R. Co. v. Bridges, 7 B. M., where the directors and stockholders constituting the corporation, instead of paying the debts of the corporation, took the money and sunk it in their own pockets; or where the sheriff has property of the principal in his possession to pay a debt for which the surety is liable, and destroys it or surrenders it to the debtor—in all these cases the legal rights of the parties are affected by the act of the party complained of.

Not so in the present case. The appellants are not liable for any debt to the appellees or the city of Louisville, nor has either of them any property pledged to secure any debt owing the appellant, but the debtor is complained of for not paying out of his own means a debt due the appellant in preference to another creditor of the same debtor.

Here the effort is to make the president and directors liable for paying debts by the company—the same company with which the appellants contracted. The city of Louisville requires the money subscribed to be applied to the building of the road within certain limits; the county of Hardin upon condition that its subscription is applied to constructing the road within its limits; and A as an individual on condition that the money subscribed by him is to be applied to the building of the road through his farm.

It is now maintained that for the labor performed upon those parts of the road designated for the application of

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the money, the laborer or contractor performing the work, although he makes an independent contract having no reference to the fund, is the sole beneficiary of the fund, and that the directors are individually liable if they apply it in any other mode, although it is done by the consent of the parties with whom they or the company contracted.

The company was under no obligation to pay the appellants out of this fund. They were not parties to the contract, and there was no trust, express or implied, that the company should pay it to the appellants, or that they were to become the beneficiaries of the fund, or any part of it. Suppose the city of Louisville had the right to have used these bonds by changing the contract on other parts of the road, as would have been the case with an individual subscription, will it be contended that the appellants had such an interest in it as to prevent this change of contract between the city and the company? We think not; and as to all parties but the city of Louisville, the company, when it obtained the money, had the right to use it for any purpose connected with the corporation, either in the construction of the road or the payment of its debts. Nor was the company, by the terms of the contract with the city, prevented from applying the money to the payment of the mortgage debt. This mortgage had been made, including doubtless all the rights and franchises of the company, and the one million dollars of stock about to be taken was understood not to be embraced by the terms of the mortgage; that no right to this stock or the subscription passed to the mortgagees, and if such had been the contract, if the road had been constructed with the company's own means, instead of the money from the proceeds of the bonds, the company had the right to apply it to the payment of the

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mortgage debt. The city, however, has its stock; at least that corporation makes no complaint of the action of the directors, and the appellant has no right to make directors personally liable because they pay one debt of the corporation in preference to the other.

It is no misappropriation of the funds of a corporation by the directors when the funds are used in good faith for the corporate purposes. To pay one debt when they could have paid another, thereby giving a preference, is not a fraudulent act on the part of the directors. It is not sufficient to allege that the directors have fraudulently misappropriated the funds of the company. It must appear in what way the fraud was perpetrated. It is said the fraud consists in paying a certain sum of money on the mortgage debt. That, as we have already seen, is not fraudulent. The company had the right to dispose of it in that way, if the city with whom it had contracted had been indemnified by the construction of the road. A third party has no right to complain when the city is silent; and besides, if a trust existed, it must be alleged that the company had, or ought to have had, a sufficient sum in its hands of this fund, after the construction of the road, to pay appellant. It had the right to apply the means to the construction of forty-five miles of the road. The road is built. Now, before appellants can recover upon this theory, it must be averred that this much was on hand after the construction. It is an averment indispensable to the maintenance of the action, adopting appellants' theory as the law of the case.

In either aspect of the case, the judgment must be affirmed.

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CASE 87—INDICTMENT—JUNE 25, 1881.

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APPEAL FROM FLOYD CIRCUIT COURT.

1. The appellant had exercised all proper diligence in attempting to obtain his witnesses, and the court should have granted him a continuance.
2. The indictment is sufficient.
3. The motion to compel appellee to elect upon which count of the indictment it would proceed was properly overruled.
4. The evidence as to where deceased had been and what he had been doing for several days before the killing was incompetent.
5. The court should have, upon the appellant's motion, excluded the father-in-law of deceased, who was a witness for appellee, while the other witnesses were testifying.
6. There is no law requiring the court to cause the bodies of deceased persons to be exhumed at the cost of the commonwealth.
7. The court erred in its instruction to the jury in regard to malice.

R. H. WEDDINGTON FOR APPELLANT.

1. The court erred in refusing a continuance. Appellant was confined in jail, and did his utmost to obtain his witnesses. The time given was insufficient. Officers refused to execute the subpoenas, and at the end of the time given he was in no better condition to try.
2. Error was committed in excluding competent testimony.
3. The court erred in its instructions.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. Appellant had a fair and favorable trial. Even if appellant had been an officer with a warrant of arrest in his hand, his act was murder.
2. The instructions are exceedingly fair to the appellant.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

John Morris was killed in the county of Floyd on the 9th of February, 1881.

Five days thereafter the appellant and Wm. Banks were arrested, tried, and held without bail by an examining court to answer for the murder of Morris.

On account of the insufficiency of the jail, they were sent to the jail of Boyd county, which is about eighty miles from

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Floyd court-house, where they were indicted on the 30th of March.

Two days before the indictment was found they were lodged in the Floyd county jail.

On the day after the indictment was filed in court the case was called for trial, and they applied for a continuance upon their joint affidavit, which was refused, but a postponement of ten days was allowed for preparation.

By direction of the appellant's counsel, subpœnas were issued to the several counties where his witnesses resided.

At the end of the postponement the case was again called for trial, and again the appellant moved for a continuance on the ground of the continued absence of his witnesses upon whom, he alleged, the subpœnas had not been served, because the ministerial officers of the counties where they resided had refused to accept or execute them.

His motion was overruled, a separate trial awarded, and he was convicted of the offense of murder, and sentenced to the penitentiary for life.

From that sentence he appeals to this court, and here complains—

1st. That he was not allowed a legal opportunity to procure the presence of his witnesses whose testimony was material to his defense.

He stated in his affidavit for a continuance, in substance, that J. M. Pigman, a justice of the peace of Letcher county, had, on the oath of his co-defendant, Wm. Banks, issued two warrants for the apprehension of the deceased, charging him in one with maliciously stabbing Emory Campbell, in Perry county, and in the other with maliciously shooting and wounding Banks, in Floyd county; and that the warrants were placed in the hands of A. H. Amburgy,

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sheriff of Letcher county, who deputized Banks, in writing entered on the back of the warrants, to execute them, and at the same time summoned the appellant to go with Banks as a guard to aid him in the act. That he could prove these facts by those officers, who resided near sixty miles from Floyd court-house. And he could also prove by Emory Campbell and Joseph Stacy, of Perry county, that "deceased, in 1875, in Perry county, Kentucky, willfully and maliciously stabbed and wounded the said Campbell, and not in his (Morris') self-defense."

He stated that he could prove by Hallifield and Combs that, after Morris was killed, the appellant and Banks "sent a man to have a warrant obtained for them, and a guard summoned to protect them, so that they might surrender and have an examination of the charge of them having killed Morris before the proper authorities, and that the party had gone to obtain the warrant when they were arrested by Hoover and his *posse*."

It is contended by appellant's counsel that the clause of section 189, Criminal Code, which reads: "When the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance *shall* be granted, unless the attorney for the commonwealth admit upon the trial that the facts are true," destroys the power of the court to postpone the trial to any time in the same term when the ground of application for a continuance is such as it contemplates.

To this construction we do not agree, because if the party should be given a reasonable opportunity to procure the presence of his absent witnesses and prepare for trial, it is unquestionably within the legal power of the court to order

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a postponement to a day in the same term. (Section 188, Criminal Code.)

There are, however, but two facts to determine about the question of continuance in this case—

1st. Were the witnesses material?

2d. Did the appellant use due diligence in his effort to have them present. (Morgan v. Commonwealth, Bush.)

[Section 35, Criminal Code, says: "An arrest may be made by a peace officer or by a private person," and section 37: "A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony."

There is no provision of the Code authorizing any other person than a peace officer to make an arrest in obedience to a warrant of arrest.

Hence the authority to execute the warrant attempted to be conferred by the sheriff, Amburgy, upon Banks, a private person, was illegal, and of itself furnished no protection to Banks and the appellant. But the fact that the sheriff had no legal authority to deputize Banks to execute the warrant and the possession of it by the latter did not deprive the one having *reasonable grounds for believing that the deceased had committed a felony* of the right to arrest him.

For without any warrant a private person may make an arrest when such is the fact. (Secs. 37 and 46, Criminal Code.) And the illegal possession of a warrant does not alter the case.

But the existence of reasonable grounds for believing, either by Banks or the appellant, that the deceased had committed a felony, furnished no authority or right to the other to aid in making the arrest, unless he likewise had *reasonable grounds so to believe*.

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Therefore the summons of the appellant by the sheriff and by Banks, to aid the latter in making the arrest, was illegal, because none but an officer making an arrest may summon persons to aid in it. (Sec. 41, Crim. Code.) But it was competent for the appellant to show that the warrants were legally issued and placed in the sheriff's hands, and that the latter summoned him to aid in making the arrest; yet, notwithstanding he may show these facts on a future trial, if he should not also show that he had reasonable grounds for believing that the deceased had committed a felony, they will avail him nothing; but in the presence of such proof they would be competent to illustrate his motive. } It was material to the appellant's defense, in view of the law as above expounded, to have not only Pigman and Amburgy, but Campbell and Stacy present, by whom he swears, in his affidavit, he can prove the deceased had committed a felony for which he was attempting to arrest him when his death ensued.

While private persons may make arrests on the ground named, still they cannot make the occasion a pretext for wreaking their vengeance upon a person known to them to be guilty; nor can any unnecessary force or violence be lawfully used in making the arrest.

On the trial, the commonwealth introduced evidence tending to show that appellant and Banks, heavily armed, resisted arrest for the space of several hours before they surrendered. This testimony disclosed the materiality of the absent witnesses, Hallifield and Combs, whose evidence, if true, would, to a great degree, negative any design upon the part of Banks and the appellant to avoid arrest and examination.

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The introduction of counter-affidavits, contradictory of the statements made in appellant's affidavit of what his absent witnesses would prove, was contrary to law, and if indulged, would frequently deprive accused persons of the right to have the witnesses of the facts brought face to face, and the benefit of a personal examination of them in open court, which so often conflicts with and explodes the biased views and misapprehensions of interested parties.

Such a practice would substitute hearsay for primary evidence, and violate the letter and spirit of section 189 of the Criminal Code, which secures to the defendant the right to a continuance or a reasonable opportunity to procure the presence of his witnesses, "when the ground of application is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove."

We believe he used due diligence. The law did not require him to anticipate his indictment and prepare his defense before it was found. He was imprisoned at such a distance from the place of trial and the residence of his witnesses, and the time allowed was so short for procuring their presence, that greater diligence than he exercised could hardly be required of him. He caused the subpoenas to be issued, and offered to the proper officers for execution, who illegally refused to accept them. He was in jail, and could not have foreseen, nor was he required to expect, the unlawful action of the officers in refusing to execute the process, nor did he have time to receive information of their action and repeat his effort to have his witnesses present on the day fixed for the trial by the order of postponement.

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The court therefore erred in not postponing the case for a greater length of time, or granting a continuance.

2. The indictment is good.

And the motion to compel the state to elect upon which count in the indictment it would proceed was properly overruled.

The charge of a conspiracy between the defendants to commit the offense for which they were jointly indicted did not constitute a separate and single offense, but it constituted an aggravating element of the one for which they were arraigned, and it was made to prevent the defendants from testifying for each other, as, without the allegation, although the fact may exist, each would be a competent witness for the other.

Subsection 3, section 165, does provide that a demurrer is proper "if more than one offense be charged in the indictment," &c.

But it must be construed with section 234, which authorizes a conspiracy to be charged against two or more persons jointly indicted for the same offense.

Such a construction of these sections as is sought to be placed upon them would make them destroy each other.

For the legislature certainly never intended, if a conspiracy be charged in an indictment against two or more for the same offense, that that would render the indictment obnoxious to subsection 3 of section 165, nor that those who are charged and proven to be guilty of a conspiracy in the perpetration of an offense can escape the denunciation of section 234 and become witnesses for each other.

It was error to allow the commonwealth to prove that the deceased had been attending upon his wife's *sick mother* for several days before his death. It was proper to allow the

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testimony as to *where* he had been, but not as to *his purpose* in being there. It had no connection with any issue in the trial. It threw no light upon any act or motive of the appellant, but tended alone to arouse and touch the sympathy of the jury.

On the motion of appellants, the court ought to have excluded the father-in-law of the deceased while the other witnesses were testifying, because he was an important witness, and afterwards testified and agreed in several material points with his son's testimony, who was but fifteen years old and the only eye-witness to the homicide. (8 Bush, pages 89-96, Walker v. Commonwealth.)

We do not mean to intimate that any untruth has been testified to by either of these witnesses, but the policy of the law in requiring the separation of the witnesses on the motion of either party is based upon sound reason and justice. And we know of no exception to the rule of excluding witnesses which allows a prosecutor and a witness in the same person to sit by and listen to the details of a trial, and then testify himself about the same or connected matters. He, of all others, except the willfully corrupt, is most obnoxious to the rule, for he may have his feelings enlisted or his revenge rankling in his bosom.

The appellant alleged in his affidavit that the boy who was present at the homicide had testified that the appellant shot the deceased once with a rifle gun, and he expected the same evidence would be given on the trial, and thereupon moved the court to have the body of the deceased exhumed, and the bullets extracted, avowing that they would all prove to be pistol balls, and that Banks had done the whole of the shooting.

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He stated that he had nothing to pay the expenses of the exhumation with, and no friends or relations who were able and willing to do so for him. The court ordered the coroner to exhume the body, and cause the examination to be made, on the condition that the appellant should first pay the expenses thereof. This he was unable to do or to have done, and of this action of the court he complains. There is no law requiring the court, at the instance of an accused person, to have dead bodies taken up and examined at the expense of the state or county, for the purpose of furnishing him with evidence in his defense; nor could it compel the officers or others to perform such service without compensation. As the court exercised all the power it had in his behalf, the appellant has no legal ground for complaint.

The last assignment of error to be noticed is to instructions. The jury were told that—

“Malice is implied by law from any deliberate cruel act committed by one person against another, however suddenly done.”

This instruction, with immaterial verbal differences, in one form or another, has been over and over denounced by the court as taking from the jury a question of fact which peculiarly belongs to its province. (*Farris v. Commonwealth*, 14 Bush; *Trimble v. Commonwealth*, 78 Ky.; *Buckner v. Commonwealth*, 14 Bush.)

An act deliberately and cruelly committed is a fact from which the jury may infer malice, its force depending, however, upon the attendant facts and circumstances of each case. In some cases it would convince the mind of a reasonable man that the perpetrator of it was actuated by

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malice. In other cases it might be extenuated, excused, or even justified by explanatory evidence.

While this court has intimated that so instructing the jury was not a reversible error, yet a correct exposition and rigid execution of the criminal law, in accordance with the genius of our republican institutions, demand that such an instruction as above quoted should no longer be tolerated.

Wherefore, the judgment is reversed, and cause remanded, with directions to grant appellant a new trial, and for further proper proceedings.

DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY.

SEPTEMBER TERM, 1881.

CASE 88—EQUITY—SEPTEMBER 10, 1881.

Simrall, &c., v. Grant, &c.

APPEAL FROM KENTON CHANCERY COURT.

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1. There must be some impediment to the remedy at law before the chancellor can be invoked to enjoin a sale of personal property levied on to satisfy an execution.
2. In a controversy between a trustee and *cestui que trust* a court of equity will entertain jurisdiction.
3. On a motion to dissolve an injunction upon the whole case the court is not bound to take the answer as true. When such a motion is made and submitted for judgment, it means a judgment whether or not the injunction shall be dissolved and no more.

M. R. LOCKHART, R. D. HANDY, AND SIMRALL & SIMRALL
FOR APPELLANTS.

1. The remedy of appellee was not an injunction, but replevin. (Nesmith v. Bowler, 3 Bibb; 4 *Ib.*, 236; 5 Litt., 136; Watkins v. Logan, 3 Mon., 20; Bouldon v. Alexander, 7 *Ib.*, 423.)
2. Section 291, Civil Code, distinctly provides, that upon motions to dissolve an injunction upon notice, the court shall not be bound to take the answer as true.
3. The court erred in overruling appellants' demurrer to the petition. (Civil Code, sec. 18.)

McKEE & FINNELL AND HALLAM & PERKINS FOR APPELLEES.

1. No bill of exceptions was filed showing upon what evidence the court refused appellants' motion. The record shows that evidence was offered, but what or how much? The presumption is against appellant.

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2. A court of equity has jurisdiction of a contest between the trustee and *cestui que trust*; otherwise, appellee is without remedy.
3. Appellants not only submitted upon motion to dissolve the provisional injunction, but they submitted also for judgment. Having so acted, they cannot complain in this court.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

An action in equity by the wife, Julia Grant, obtaining an injunction to prevent the sale of her trust property under an execution against her husband. This action in equity is really between the trustee and the *cestui que trust*, the creditor of the trustee insisting that it is the individual property of the trustee, and subject to the payment of his debts; and not only so, has levied his execution on the trust property, and is about to dispose of it. There must be some impediment to the remedy at law before the jurisdiction of the chancellor can be invoked to stay a sale of personal property levied on to satisfy an ordinary execution. Generally the remedy is ample and complete at law; but where the controversy is between the trustee and the *cestui que trust*, a court of equity will entertain jurisdiction on the complaint of either when made with reference to the trust estate.

It is true the husband, who is a nominal plaintiff, is the trustee, but still the creditor has presented an issue in which the right of the trustee, who is the husband, is in direct conflict with the right of the wife, and the latter is seeking the aid of the chancellor to protect her in the trust property, alleging that she has no means but this trust estate, and to deprive her of the property would be to leave her destitute of any household furniture for the comfort of herself and family. She is a married woman, and wants the trust declared, and the rights of her husband, if any, determined. We think the chancellor has jurisdiction. Shortly after this petition was filed, and the injunction

obtained, a motion was made by the appellant to dissolve it on the face of the papers. This motion having been overruled, the appellants filed an answer raising an issue as to the rights of the wife, and gave notice that on a certain day they would move to dissolve on the whole case.

By section 291 of the Code, after answer filed by the party enjoined, he may give notice of his motion, to be made in not less than ten days, to dissolve on the whole case, and on the motion any competent evidence may be heard. That section further provides, that "the court shall not be bound to take the answer as true."

When the case was called, each party declined to introduce any testimony, the plaintiffs objecting to a submission, and the defendants, now appellants, insisting upon a hearing. The case was then submitted, and the chancellor rendered a final judgment establishing the trust and perpetuating the injunction. It is insisted by the appellants that this judgment was premature, as the case did not stand regularly for trial on its merits, and that, although testimony might have been heard as to the principal issue, all the action the court could properly take was to overrule the motion to dissolve.

Whether, where the entire controversy is necessarily involved on a motion to dissolve on the whole case, the decision of the court on the motion is final, is the question raised.

The chancellor certainly had the right to hear testimony as to the claim of each party, and in passing on the question must necessarily determine the rights of property to be in the one or the other. Yet, if he dissolves the injunction only, or overrules the motion to dissolve, the order is not final, and ordinarily the dissolution of the injunction does not determine the merits of the controversy or settle

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the rights of the parties; but such questions are left for future adjudication.

The case was not submitted for final judgment, and did not stand for trial, except on the motion to dissolve. Section 293 of the Code provides, that "after hearing the motion, the court or judge shall overrule it, or dissolve or modify it according to the rights of the case."

This section controls the action of the chancellor, and the subsequent section (294), providing that but one motion shall be made to dissolve on the whole case, shows clearly that the case, after the motion has been heard, may be finally disposed of on its merits, although it may involve a re-investigation of the identical question disposed of on the motion.

The record shows that the case was submitted upon the motion to dissolve on the whole case, and for judgment. The appellants insist that it was for a judgment on the motion, and in this view we concur. The Code expressly provides that the court, on a motion to dissolve, is not bound to take the answer as true, and when the cause was submitted for judgment, it meant a judgment on the motion. Counsel would not have submitted the case on petition and answer when the result was so manifest.

The court, instead of rendering a final judgment (the case not standing for trial), should have entered an order overruling the motion to dissolve.

The judgment is therefore reversed, and cause remanded for further proceedings consistent with this opinion.

Embry v. The Commonwealth.

CASE 89—INDICTMENT—SEPTEMBER 10, 1881.

Embry v. The Commonwealth.

APPEAL FROM OHIO CIRCUIT COURT.

1. "Intimidating, alarming, and disturbing any person," &c., denounced in section 2 of the act, entitled "An act to amend chapter 28, Revised Statutes," approved April 11, 1873, imply the use of physical force or menace, and involve a breach of the peace.
2. The indictment is insufficient.

WALKER & HUBBARD FOR APPELLANT.

1. The court erred in overruling appellant's demurrer to the indictment.
2. And erred in instructions to the jury.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

No brief.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

The appellant and Louis Hix were indicted under the second section of the act, entitled "An act to amend chapter 28 of the Revised Statutes, title 'Crimes and Punishments,'" approved April 11, 1873, for the offense of unlawfully confederating together for the purpose of intimidating, alarming, and disturbing another.

Appellant having been convicted, and adjudged to be confined in the penitentiary eleven months, appeals to this court for reversal of the judgment.

The facts stated in the indictment as constituting the offense are, that "said Embry and Hix, in the county of Ohio, on the — day of January, 1878, and before the finding of the indictment, did willfully and unlawfully confederate and band themselves together for the purpose of, and did, then and there, willfully and unlawfully intimidate, alarm, and disturb Jordan Pearson, by then and there threatening to have said Pearson prosecuted in the United States court for selling whisky in said county without license, and by

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thus confederating as aforesaid, and threatening as aforesaid, greatly intimidated, alarmed, and disturbed said Pearson, and by so doing as aforesaid, demanded of, and against his will forced said Pearson to pay them thirty-one dollars in money in consideration that they would not inform on or testify against him concerning said matter of selling whisky as aforesaid," &c.

The second section of the act is as follows: "If any two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, or disturbing any person or persons, or to do any felonious act, they, or either, shall, on conviction thereof, be confined in the penitentiary not less than six nor more than twelve months, or, in the discretion of the jury, fined not less than one hundred nor more than five hundred dollars, and imprisoned in the county jail not less than three nor more than six months."

Whether the statute be considered with reference to the reason for its enactment, and the mischief intended thereby to be provided against, or construed according to either the common and approved usage of language, or the technical meaning of the words used, it is clear that the facts stated in the indictment do not constitute the offense described in the second section.

The mischief the legislature intended, by the statute, to provide a remedy against was the confederating and banding together of disorderly and evil-disposed persons for the purpose of unlawfully, and by the use of physical force, or threats of force and violence, overawing and injuring the persons and property of obnoxious and defenseless individuals, to the disturbance of public tranquility and order.

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Intimidating, alarming, and disturbing, in the sense the words are obviously used by the legislature, as well as according to their legal signification, imply the use of physical force or menace, and involve a breach of the peace.

The statement in the indictment is, that appellant and Hix confederated and banded themselves together for the purpose of intimidating, alarming, and disturbing Pearson, not by violence to his person or property, or threats of violence, but by threatening to have him prosecuted in the United States court for selling whisky without license.

If Pearson was guilty of violating the revenue laws of the United States, which is not negatived, and may be reasonably inferred, it was not unlawful for appellant and Hix to have him prosecuted for the offense, or to confederate for that purpose.

But whether he was guilty or not, the particular circumstances stated in the indictment do not constitute any offense in the meaning of the second section of the statute.

It is alleged in the indictment that Pearson was, by a threat of being prosecuted, forced against his will to pay to them thirty-one dollars in consideration that appellant and Hix would not inform on or testify against him. But the offense charged being for confederating for the *purpose* of intimidating, alarming, and disturbing, and not for any actual injury to person or property, it is immaterial why the money was paid, or whether it was paid at all or not.

The circuit court erred in overruling the demurrer to the indictment and the motion in arrest of judgment.

Wherefore, the judgment is reversed, and cause remanded, with directions to sustain the demurrer and dismiss the indictment.

Louisville, Cincinnati and Lexington Railroad Co. v. Goetz's adm'x.

CASE 90—ORDINARY—SEPTEMBER 13, 1881.

Louisville, Cincinnati and Lexington Railroad Company v. Goetz's adm'x.

APPEAL FROM KENTON CIRCUIT COURT.

1. To instruct the jury that "plaintiff's testimony shows that deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by defendant's train by keeping off the track at crossing-time, and if he failed so to avoid the train," &c., is error.
2. It interferes with the province of the jury.
3. It requires that all care and caution be exercised by the deceased, but none by appellant.
4. While it is the duty of persons crossing or attempting to cross a railroad track to exercise proper care and caution, it is also the duty of the employes of the railroad, or those in charge of the train, to exercise such care and precaution at such places as to prevent injury to those traveling on public highways.
5. The duty in this regard is reciprocal, and the court should have so instructed the jury.

BARNETT & NOBLE FOR APPELLANT.

1. The fact as to negligence is for the jury to decide. A scintilla of evidence is not sufficient to give a case to the jury. (47 Md., 76; 91 E. C. L. R. R., 146; *Ib.*, 72; 5 Am. Rep., 251.)
2. Only ordinary care and diligence is required of a railroad company toward others than those in its charge. (47 Md., 76; 1 Exchequer, 13; Law R. C. P., 631; P. & M. R. R. Co. v. Hoel, 12 Bush, 41.)
3. It is the duty of every one about to cross a railroad track to approach it cautiously, and ascertain if there is danger. (87 Ills., 529; 22 Minn., 165; 12 Bush, 41; 58 Ills., 300; 63 *Ib.*, 178; 73 Pa. St., 503; 25 Mich., 274; 4 Vroom, 189; 61 Pa. St., 361; 105 Mass., 77.)

W. E. ARTHUR AND STEVENSON & O'HARA FOR APPELLEE.

1. To authorize a peremptory instruction to the jury to find for the defendant, it must appear that, admitting the evidence to be true, the plaintiff has failed to support his cause of action. (L. C. & L. R. R. Co. v. Carr, 9 Bush, 734; 13 *Ib.*, 643; Shay v. R. & L. T. P. Co., 1 *Ib.*, 109; L. C. & L. R. R. Co. v. Mahoney, 7 *Ib.*, 237; 2 *Ib.*, 140; 18 B. Mon., 93; 2 Mon., 423; U. S. of Shakers v. Underwood, 11 Bush, 276; 2 B. Mon., 366; 17 B. Mon., 29; 20 N. Y., 65.)
2. The construction, condition, and contiguous territory with reference to the crossing are essential elements of proof upon the question

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- of negligence. (Claxton's adm'r v. Big Sandy R. R., 13 Bush, 643; 13 Bush, 389; P. & M. R. R. Co. v. Hoel, 12 *Ib.*, 44; 5 Otto, 162; Shearman & Redfield on Neg., 480-485; 20 N., 65; 19 Ills., 499; 47 Ills., 298; 29 Iowa, 55; 26 Ind., 76; 30 N. J. Law, 188.)
3. The instructions given for appellee are the law. (9 Bush, 737; 5 Otto, 164; 9 Bush, 732; 13 *Ib.*, 642; 6 *Ib.*, 578; 13 *Ib.*, 389; 14 *Ib.*, 523; 12 *Ib.*, 45; 2 Met., 149; 6 Bush, 380; 9 *Ib.*, 531; 10 *Ib.*, 680; *Ib.*, 273; 4 *Ib.*, 509; Gen. Stat., 521; 2 Duv., 559; 9 Bush, 733.)
 4. The court properly refused the instruction asked for by appellee. (9 Bush, 734; 12 *Ib.*, 50; 5 Otto, 165; Civil Code, 327; L. & P. R. R. Co. v. Smith, 2 Duv., 559; *Ib.*, 115; 14 Bush, 524.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee's intestate, Michael Goetz, in attempting to cross the track of the Louisville, Cincinnati and Lexington Short-Line Railroad, at the intersection of that road with the Covington and Independence Turnpike, was run over and instantly killed by a train of cars owned and operated by the appellant.

The widow of the deceased, as his administratrix, instituted the present action under the statute, alleging that her husband lost his life by reason of the negligence, &c., of the employés of the appellant in running its trains, and recovered a judgment for \$4,500 in damages, of which the appellant is complaining.

The testimony conduces to show that the traveler on the turnpike, on his way from Covington to Independence, the direction in which the deceased was going, is prevented from seeing the line of the railway or its trains as he approaches this crossing, by reason of an elevation or high ridge of ground that intervenes, until he reaches a point at or near the center of the railroad track. The intestate, a farmer about forty-three years of age, while driving his team from Covington to his home, in the county of Kenton, about seven o'clock in the evening, while crossing the railway at its intersection with the turnpike, was run over by

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the cars, and found dead in a few moments afterwards a short distance from the crossing. No one was with the deceased at the time of the accident, and the recovery in the court below was based principally on the statements of those in charge of the train at the time of the accident, and the ground of recovery is, "that the appellant or its employes failed to give the deceased sufficient warning of the approach of the train, and to use the necessary precaution to apprise those traveling on the turnpike of the danger in attempting to cross at this particular point in the road."

It further appears that the deceased was a careful, thrifty farmer, and familiar with the territory at and near the intersection of the roads, as well as the time the trains usually passed the point at which he was killed.

The train inflicting the injury was on its way from Louisville to Cincinnati, and a minute or two behind its regular time at this crossing. It was running at a speed of thirty miles an hour, and from the statements made by the engineer in charge of the train, it is doubtful whether the deceased could have avoided the injury by the exercise of the utmost vigilance on his part, unless he had kept off the track of the railroad until the train passed. This witness stated, on being interrogated by counsel for the appellant (the company), that when he blew the long whistle, which is the common signal for the approach of the train, he was only sixty or seventy yards from the crossing, or perhaps further; and being again interrogated, stated the train was three hundred yards distant from the intersection when the long whistle was sounded, and the bell was also rung by the fireman, and in this statement he is corroborated by the latter; that he was in forty feet of the intersection when he saw the horses upon the track, and then reversed the engine,

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using every effort within his power to check the progress of the train. The train at the time was on a down grade, with its speed, as the engineer states, increasing as it approached the turnpike, and it is manifest that no human effort could have prevented the misfortune after the horses had gotten on the track of the railroad and were in the act of crossing it. Numerous instructions were given at the conclusion of the testimony, and several instructions asked for by the appellant were refused.

We deem it necessary to consider only the principal instruction asked for by the appellant, as it is clear, if this instruction embodies the law of the case, the verdict should have been for the defendant. The refusal, or giving of other instructions, did not prejudice the substantial rights of the parties, and besides, the special finding had, on motion of the appellant, shows that the jury passed upon the real issue, and could not have been misled by any instruction given or refused, except the instruction we propose to consider.

That instruction reads: "For the defendant, the jury are told that the plaintiff's testimony shows that the deceased was familiarly acquainted with the crossing and the time of the passing of the trains, and it was his duty to have avoided being run against by defendant's train, by keeping off the track at crossing time; and if he failed so to avoid the train, and placed himself so close to the train as to put it out of the power of the defendant's employes to avoid injuring him, then the law is for the defendant." This instruction should have been refused for several reasons.

In the first place, it was the province of the jury to pass upon the facts evidencing the neglect of either party, and the court had no right to assume that the deceased was.

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acquainted with the road and its surroundings, or with the time that trains passed. Whether such facts had been established was with the jury and not the court, and particularly when the jury were told that the existence of such facts precluded a recovery.

The court, if the testimony showed negligence on the part of the deceased and not on the part of the company, might have instructed the jury to find for the defendant; but when the jury was left to determine the issue, the court should not have assumed that certain facts had been established conducing either to defeat or sustain the recovery. Again, the instruction requires that all the care and caution should have been exercised by the deceased, and none by the company; for if this instruction is the law, the presence of the deceased on the road is such evidence of negligence on his part as defeats the action.

If the right to the use of this crossing is not mutual, or the company has the exclusive right to its use, then the instruction would not be so objectionable. It is no response to a claim for damages in a case like this to say, that if the deceased had remained off the crossing until the train passed, he would have escaped injury, and his being on the crossing at the time the train passed is evidence of his neglect.

The right of the appellant to run its trains on the road at this point, and at any reasonable rate of speed, is unquestioned; but at the same time it is incumbent on the company and its employes, or those in charge of the train, to exercise such care and precaution as to prevent injuring those traveling on public highways at points crossing the track of its railway. It is not necessary or required of those in charge of the train to stop in order to see whether or not persons are approaching the crossing; but, on the

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contrary, it has the right to pass, and those on the highway seeing or knowing of its approach, or when the proper and necessary signals have been given so as to notify them of the train's approach, they must yield the right of passage to the train. The great speed of the train, the necessities and safety of those on it, as well as the safety of the traveler on the ordinary highway, all require that this preference should be given; still it is the duty of those in charge of the train to give due and proper warning of its approach, that those crossing its track may know and avoid the danger; and when passing great thoroughfares thronged with travel, the speed of the train should be checked, or other means devised to insure the safety of those on the highway; and a failure to give such warning, or to use such precaution, must be regarded as negligence. (Paducah and Memphis Railroad Co. v. Hoehl, 12 Bush, 45; Claddin's adm'r v. Lex. and Big Sandy Railroad, 13 Bush, 642; Lou. and Nash. Railroad v. Commonwealth, 389.)

While those on the highway, when about crossing a railroad track, must exercise proper diligence and care with reference to their own safety, where there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life or entered upon the track of the road, knowing of the train's approach.

If the presumption of negligence arises from the mere fact that the deceased was killed on the track at a place where he had the right to be, it must necessarily defeat a recovery in all such cases, unless it should appear that those in charge of the train, after discovering the dangerous

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condition of the party injured, could, by the exercise of ordinary care, have avoided inflicting the injury.

This doctrine might apply if the party injured was on the track of the railroad, where he had no right to be, but has no application to a case like this.

Counsel for the appellant have called the attention of the court to several cases in support of the instruction asked, and while they conduce to sustain the position taken, they cannot be reconciled with the adjudications of this court on similar questions.

The principal case is that of the Pennsylvania Railroad against Beal, 73 Penn. State Reports, in which it is said: "A prudent and careful man will always stop and listen for the approach of the train when about to cross its track. Indeed, the duty of stopping is more manifest when an approaching train cannot be seen or heard than where it can. If the view of the track is unobstructed, and no train is near or heard approaching, it might perhaps be asked, why stop? In such a case there is no danger of collision—none takes place, and the sooner the traveler is across the track the better. But the fact of collision shows the necessity there was of stopping, and therefore, in case of collision, the rule must be an unbending one."

The fact that the traveler failed to stop and listen before entering upon the track is made negligence *per se* by the cases cited, and in the case before us, because there is no evidence that he did stop and listen, we are asked to presume that he did not stop, and therefore his personal representative cannot recover. (Hanover Railroad v. Coyle, 5 P. F. Smith, 396.)

That a prudent man should use at least ordinary precaution to know whether a train is or not approaching, is evi-

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dent; but if he fails to do so, or if there is no proof as to what care he did take before going upon the track, does this dispense with the necessity of those in charge of the train from giving the proper warning or using the proper care to prevent collision at such points on the road? We think not. It is evident if the party injured had not gone on the track, no collision would have taken place; but it by no means follows because he was killed at the crossing, a point where he had the right to travel, that he is guilty of such negligence as excuses the company for its neglect.

That the party injured may be guilty of such contributory negligence as to prevent a recovery is conceded; but in this case both parties had the right to the use of this part of the road for passing. This right was mutual, with the duty on the part of the deceased to exercise such caution as an ordinarily prudent man would under the circumstances; and the exemption of the appellant from all liability in the event it gave the proper warning of the approach of its trains, and the killing or injuring was unavoidable.

The same degree of care is required of both those in charge of the train and those traveling over a public highway crossing its track. The case of the Continental Improvement Co. v. Stead, reported in 5th Otto, page 163, embodies the law of this case. "Both parties," says the court in that case, "must exercise such care as men of common prudence and intelligence would ordinarily use under such circumstances. When the view is obstructed so that parties crossing the railroad would not see an approaching train, the exercise of greater care and caution was required on both sides. Those in charge of the train should approach

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the crossing at a less rate of speed, and use increased diligence to give warning of its approach."

The question of negligence was properly left to the jury, and by a special finding, made at the instance of the defendant, the jury said: "*The negligence consisted in the running of the train at too great a speed in its approach to the turnpike, and in not giving the proper precaution, and in not having a flagman at the crossing.*" Under this special finding, the only question really to be considered is, did the evidence authorize the conclusion reached by the jury?

The turnpike on which the accident took place is one of the most important highways in that portion of the state, leading directly from the city of Covington; it is constantly thronged by travelers, and a greater degree of care and caution should be exercised than at ordinary crossings. The usual whistle, if made in reasonable time, so as to give the warning, would ordinarily be sufficient; but the point at which the accident occurred in this case is within six miles of the city of Covington, and a stream of travel over the turnpike that is common in such approaches to the larger cities of the state.

The train in this instance crossed the turnpike on a descending grade, with an increased rate of speed, running thirty miles or more an hour, with no other signal or warning than a whistle within seventy yards, or at best within three hundred yards of the crossing, to warn those traveling on the turnpike of its approach. This is itself culpable negligence, and renders any approach to the railroad on such a thoroughfare dangerous to all passing over it. Running a train at such speed over the streets of a small village would be attended with little more danger. It being the duty of those on the highway to look and listen for

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the approach of the train, it is equally the duty of those in charge of the train to give sufficient warning of its coming; and on such a thoroughfare as this turnpike is shown to be, to lessen the momentum of the train, as well as to provide other means to insure the safety of those traveling the highway, as well as those on board the train.

As said in the case cited, "if an unslackened speed is desirable, watchmen should be stationed at the crossing." The traveler is required to stop so that the trains may pass; but this is conditioned upon the train giving due and timely warning of its approach. "The duty of the wagon to yield precedence is based upon this condition." The blowing of the whistle three hundred yards from such a crossing, and *running with the speed of the train in this case*, is not a sufficient warning, and the facts authorize both the special and general finding. The judgment is affirmed.

CASE 91—INDICTMENT—SEPTEMBER 17, 1881.

The Commonwealth v. Miller.

APPEAL FROM CALLOWAY CIRCUIT COURT.

It is no objection to an indictment that the time of committing an offense is laid on the same day it is presented to the court and filed, provided it alleges that the offense was committed before the time of finding it.

P. W. HARDIN, ATTORNEY GENERAL, AND C. H. THOMAS, COMMONWEALTH'S ATTORNEY, FOR APPELLANT.

1. The indictment is sufficient.
2. The statement of the indictment as to the time at which the offense was committed is not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense. (Crim. Code, sec. 129; *Ib.*, 136, 137; Wharton's Am. Crim. Law, vol. 1, 261; 5 Howard

The Commonwealth v. Miller.

(Miss.), 14; 4 Dana, 496; 9 Cowen, 660; Chitty's Crim Law, 117, 557, 173; 15 Vermont, 291; Thacher's Cr. Ca., 147; 3 McLean, 89; 3 Hawkins, 384; 5 S. & R., 316; 4 Reading, 52; 1 Gray, 483; 4 Cranch's C. C. R., 104; 10 Cush., 69; 18 Ark., 363; 5 Cal., 355; 2 Metcalfe, 374; *Ib.*, 8; 3 *Ib.*, 484; 1 Bush, 40; Kriel v. Commonwealth, 5 *Ib.*, 375; 3 Met., 5; *Ib.*, 407; 1 Duv., 90; 9 Bush, 178; 7 B. Mon., 1; 2 Yerger, 233; 3 J. J. Mar., 133-4; 7 Bush, 741; 1 Met., 368; 14 Bush, 530; K. L. R., March, 1881, 211; 18 B. Mon., 293; 1 Swain 413; People v. Ball, Barbour, 324.)

DIUGUID & REED FOR APPELLER.

The indictment is insufficient. It is necessary to aver that the commission of the offense was on some day before the day on which it is presented to the court. (Wharton's Crim. Law, secs. 261, 262; Joel v. State, 28 Texas Rep.; Waterman's U. S. Crim. Dig., 333; sec. 129, Crim. Code; Commonwealth v. Jones, 1 Bush, 40; sec. 128, Myers' Crim. Code; State v. Slack, 30 Texas; 1 Chitty's Pleadings, title "Time.")

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

The only question in this case is, whether the demurrer to the indictment was properly sustained.

The defendant is charged with having committed the offense upon the same day that the indictment was presented to the court by the foreman of the grand jury and filed, viz: on the 24th of November, 1880.

The commission of the offense is charged as follows: "The said J. A. Miller did, on the 24th day of November, 1880, in the county aforesaid, carry concealed on and about his person a pistol, the same being a deadly weapon," &c.

Section 129, Criminal Code, is as follows: "The statement in the indictment as to the time at which the offense was committed is not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense."

Grey's ex'r v. Lewis, &c.

Whatever may have been the rule before the adoption of the Criminal Code, it is now no objection to an indictment that the time of committing an offense is laid on the same day the indictment is presented to the court and filed, provided the offense is alleged to have been committed before the *time* of finding the indictment.

Although it would have been better and more accurate to have stated in express terms that the offense was committed before the finding of the indictment, the words used clearly imply such to have been the fact.

The allegation that the defendant did, on the 24th of November, 1880, carry concealed a deadly weapon, necessarily means that at the time the indictment was found the offense had already been committed.

The court below erred in sustaining the demurrer to the indictment.

Wherefore, the judgment is reversed, and cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

CASE 92—EQUITY—SEPTEMBER 17, 1881.

Grey's ex'r v. Lewis, &c.

APPEAL FROM HICKMAN COURT OF COMMON PLEAS.

1. When an action has been filed by a personal representative to settle an estate under chapter 3, title 10, Civil Code, it is in the sound discretion of the chancellor to prescribe the time within which creditors may present their demands, proved and verified according to law.
2. The object of the legislature is not to discriminate against non-resident creditors, but to facilitate the settlement and disposal of estates of persons not resident at the time of their death.

79	453
101	291
79	453
1135	436

Grey's ex'r v. Lewis, &c.

3. The limitation of two years is the period within which the personal representative is required to dispose of such estates. But while assets remain in his hands creditors elsewhere, as well as in Kentucky, may, even after two years, prove and demand their claims against the estate.

BULLOCK & BULLOCK FOR APPELLANTS.

1. Story, in his Conflict of Laws, section 534, says that it is better that we serve and protect the rights of our own citizens than the rights of others.
2. We insist the foreign creditors must literally comply with the statute, or else they cannot be admitted to prove their demands. (Sec. 8, art. 2, chap. 39, Gen. Stat.)

MOSS & RAY FOR APPELLEES.

1. The court committed no error in exercising its discretion in permitting the claims of foreign creditors to be filed and allowed. (Sec. 8, art. 2, chap. 39, Gen. Stat.)
2. The reason and spirit of the provision are to fairly settle the estates of non-residents who die seized of property in this state, and pay it equally to all the creditors, regardless of where they may reside.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

The facts in this case, by agreement stated in the judgment rendered, are as follows: In 1875 Ben. E. Grey, a resident of the state of Alabama, died there testate, and May 5, 1875, John P. Grey qualified in Hickman county, Kentucky, as his executor.

The executor has made no settlement with the county court nor distributed, removed from the state, or paid to creditors, any part of the estate. In fact, the personal assets, if any at all, are inconsiderable. But on the — day of May, 1877, he filed in the Hickman court of common pleas a petition in equity for a settlement of the estate as provided in chapter 3, title 10, Civil Code.

The appellees, who are creditors, and residents of Alabama, proved and demanded their debts here within two years from the date the executor qualified. They were afterwards filed with the commissioner of the common pleas.

Grey's ex'r v. Lewis, &c.

court, and by him allowed, and reported to court as valid demands against the estate. But not being verified in the manner required by law, exceptions to them were sustained. Subsequently, though not within two years from the date of qualification by the executor, they were properly verified, and again allowed and reported to court by the commissioner.

The creditors who are residents of this state contested the right of the Alabama creditors to payment of any part of their debts out of the estate here. But the court below rendered judgment for a sale of the real property of decedent, and the payment of the balance left of the proceeds thereof, after satisfying certain preferred claims, to the general creditors, without preference, *pro rata*. But the amounts which the Alabama creditors have received or can receive from the assets and estate in Alabama are to be deducted from their respective debts; the several amounts to be so deducted being fixed by the judgment.

From that judgment the executor, the Kentucky creditors, and Lucy Kendall and Nannie Perkins, to whom the land adjudged to be sold was devised, have appealed to this court, and assign the following errors:

1st. "The court erred in allowing the Alabama creditors to *pro rata* the proceeds of the land sold with the Kentucky creditors, and decreeing a sale of land to pay Alabama claims."

2d. "The court erred in allowing the Alabama claims, when the same had not been presented to the executor within two years, properly proven against said estate."

The two errors complained of are virtually the same, and involve practically but one question.

Grey's ex'r v. Lewis, &c.

In support of their views, appellants rely upon section 8, article 2, chapter 39, General Statutes, which is as follows: "If such person's (non-resident) estate found in this commonwealth shall be insufficient to pay the creditors here, it shall be disposed of, without preference, *pro rata* among the creditors here, and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative. But there must be deducted from such foreign debts the amounts received or which can be received by the foreign creditor from assets and estate not in this commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

The section quoted does not apply when an action in equity is brought to settle insolvent estates and sell real property to pay debts. Neither is the construction put upon it by appellant's counsel the proper one.

If the personal representative has not assets in his hands with which to pay debts against the estate, there is no necessity for creditors to present their demands to him for payment. After the action to settle the estate is commenced, it is in the sound discretion of the chancellor to prescribe the time within which creditors may present their demands proved and verified according to law, and the question of their validity is subject to his decision.

There is nothing in this case showing an abuse of discretion in permitting the debts of the Alabama creditors to be proved and filed with the commissioner; nor does it appear they have received or can receive from the assets and estate in Alabama any greater sums than they are charged with in the judgment. The justice of their demands is not denied.

The Auditor v. Major.

The object of the legislature was not, by that section, to discriminate against non-resident creditors, but to facilitate prompt settlement and disposal of estates of persons non-resident at the time of their death that may be in the hands of personal representatives in this state.

The limit of two years mentioned is the period within which personal representatives are required to dispose of such estates, and may do so without incurring liability to either Kentucky or foreign creditors who have failed to prove and demand their debts of him.

But while assets remain in his hands undisposed of, creditors elsewhere, as well as here, may, even after the expiration of two years from the time he qualifies, prove and demand their debts. So, even if the section referred to applied to this case, the Alabama creditors would not be precluded.

Wherefore, the judgment is affirmed.

CASE 93—ORDINARY—SEPTEMBER 20, 1881.

The Auditor v. Major.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. The resolution of the general assembly, adopted in 1840, does not authorize the Public Printer to publish any report, unless he be specially directed to do so by the legislature.
2. The act of March 10, 1870, and the resolution of March 12, 1878, expressly provide that the printing for the Insurance Bureau shall be paid for out of the fees and allowances received by the Commissioner under the law creating the Bureau.
3. The object of the act establishing the Insurance Bureau is that it should be self-sustaining.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLANT.

The meaning of the resolution of 1840 is, that the Public Printer should furnish, in a separate volume, such reports made to both houses of

The Auditor v. Major.

the general assembly as he had originally published. It is not true that the Public Printer printed one thousand copies of the report authorized by the act of March 10, 1870, to establish an Insurance Bureau. It is intended that the Bureau shall sustain itself. (Act March 12, 1878.)

A. DUVALL FOR APPELLEE.

The Insurance Commissioner is a subordinate of the Auditor, and reports to him. The Auditor reports to the general assembly. The result is that the Public Printer was bound by the statute to print and publish the report. (Sec. 14 of the act to establish an Insurance Bureau, Sess. Acts, 1869-'70, page 80; Sess. Acts, 1839-'40, page 278.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellee, Major, brought this action for a mandamus to compel the Auditor of Public Accounts to issue his warrant upon the State Treasurer for the sum of \$1,527.14, in payment of a demand against the state for public printing.

The facts alleged in the petition are, in substance, that the legislature, by a resolution passed in February, 1840, provided that the Public Printer shall publish *all reports* made to both houses of the same matter in a separate volume; that "An act to establish an Insurance Bureau," approved March 10, 1870, makes it the duty of the Insurance Commissioner to make annually *a report* to the Auditor of the condition of the insurance companies doing business in this state, with suggestions, &c., and that one thousand copies of *such reports* shall be published by the state, subject *to the order of the Auditor*, and at the expense of the Insurance Bureau, and the Auditor shall place *the same* before the legislature, with an account of the receipts and expenditures of the Insurance Bureau; that the Insurance Commissioner made his *report* to the Auditor as provided in the act of March 10th, 1870, and the Auditor placed *the same* before the legislature; that it became the duty of the Public

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Printer to publish *said report* so placed before the legislature, and he did publish 624 copies thereof, for which the commonwealth of Kentucky is indebted to him in the sum of \$1,527.14, and that he had demanded of the Auditor a warrant therefor, but he refused to issue it.

It was agreed that 1,000 copies of the report of the Commissioner to the Auditor had been published by the state, subject to the order of the Auditor, and at the expense of the Insurance Bureau.

The Auditor demurred to the petition; it was overruled, to which he excepted, and failing to plead further, a judgment was rendered awarding the mandamus.

The vital question on this appeal is, was it the duty of the Public Printer, without the order of the Auditor, to re-publish the *report* of the Commissioner to the latter, who placed the same before the legislature, after having 1,000 copies of it published.

The resolution of 1840 provided, that the "Public Printer shall thereafter, in executing the public printing, publish all reports made to both houses of the same matter in a separate volume, and dispense with the appendix to each of the volumes of Journals as now published, and that one copy be sent to each individual entitled to copies of the Journals."

The proper construction of this resolution does not authorize the inference that the Public Printer shall publish all reports of the same matter made to both houses.

It simply meant that in executing the public printing which he might be ordered to do, he should publish *all reports in a separate volume*, and that one copy should be sent to each individual entitled to copies of the Journals, whose appendixes were thereafter to be dispensed with.

The Auditor v. Major.

provided such reports were of the same matter and made to both houses

It had reference alone to the *form* in which that class of reports should be published, and required that they should be published in separate volumes.

The proceedings of nearly every session of the legislature since 1840 contain resolutions or acts regulating the number and character of reports and public documents published, which shows that the legislature has not and does not construe the resolution of 1840 as providing for the publication of *all reports* to both or either house.

Appellee's construction of that resolution would require the publication of 640 copies of each report made to both houses, without making any distinction between important and unimportant reports.

We do not think this unreasonable result should follow the construction of the resolution of 1840, and we are of the opinion that it does not authorize the Public Printer to publish any report, unless he be specially directed to do so by the legislature.

And as to the printing for the Insurance Bureau, the act of March 10th, 1870, and the resolution of March 12th, 1878, expressly provide that it shall be paid for out of the fees and allowances received by the Commissioner under the law creating the Bureau.

The purpose of the legislature seems to have been to make the Bureau self-sustaining, and either a legally authorized order of the Auditor, or the act creating it, or some amendment thereto, or law passed since its creation, must be shown authorizing the Public Printer to make publications relative thereto, before he can lawfully assert a claim therefor against the state.

Minton v. the Commonwealth.

The act of March 20th, 1876, re-enacted the law requiring the election of a Public Printer, and so much of chapter 90 of the General Statutes as was deemed applicable to his office and duties.

By section 13, which was restored, it is provided that—

“If *any* report, bill, or document is ordered to be printed, and no number of copies is designated, there shall be but two hundred printed at public expense.”

This section reserved to the legislature the power of ordering what reports should be published, and provided also, if by oversight or otherwise, it should fail to fix the number, that only two hundred should be printed.

And it repeals, by necessary implication, the resolution of February, 1840, whatever may be its correct construction.

Taken in connection with the aforementioned acts of the legislature, we do not doubt this is the legal effect of said section.

Wherefore, the judgment is reversed, and cause remanded, with directions to sustain the demurrer, and for further proper proceedings.

CASE 94—INDICTMENT—SEPTEMBER 20, 1881.

Minton v. The Commonwealth.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

1. The fifth instruction for appellee is error.
2. Whenever a person is in imminent danger of great bodily harm, or it is being inflicted upon him, whether it endanger his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment to be necessary to repel or deliver himself

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from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him.

3. The third instruction, taken in connection with the fifth, excludes appellant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure any one thereby. An instruction should have been given to meet that view of the case.

MERCER, HAYCRAFT, KINCHELOE, AND ESKRIDGE FOR APPELLANT.

1. The court should have given the whole law applicable to the case. (7 Bush, 327.)
2. The third instruction is an abstract proposition.
3. In the fifth instruction the court say that the right of self-defense did not exist, unless to avoid great bodily harm, which would endanger appellant's life. This is error. (Bishop on Crim. Law, vol. 2, 630; Bl. Com., vol. 2, 191; 13 Bush, 718.)
4. There is no instruction as to involuntary manslaughter.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. The instructions are full, and substantially cover the whole law of the case.
2. They give to appellant the full benefit of the law as to involuntary manslaughter. Taking them as a whole, no error has been committed to appellant's prejudice.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellant Minton, as the evidence tends to show, was at his voting precinct, partially intoxicated, on the day of the election for representative to the legislature, and that Willis T. Frank, who was a candidate for that office, and the favorite of Minton, was also there, when one Speak rode up in haste, huzzaing for Frank's opponent. He alighted from his horse, began dancing, and continuing to shout for his candidate, and Minton answered him with a shout for his candidate. This occurred several times, when Minton struck him once or twice in the back of the head or neck, and Speak turned, seized him by the throat, backing him to a corner of the fence, and choked him until he was black in the face. The father of Minton attempted to separate

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them, and while he was so engaged, or just afterward, the appellant Minton drew his pistol, and, either intentionally or accidentally, fired it and killed said Willis T. Frank. Immediately after the shot, the crowd, which had pressed close to Speak and Minton during their struggle, and manifesting favor to the former, loudly exclaimed "kill him!" and pursued Minton with rocks and clubs.

He was indicted, tried, and convicted of the offense of manslaughter, and sentenced to the penitentiary for twenty-one years, and he prosecutes this appeal, seeking a reversal mainly on the ground that the court erroneously instructed the jury.

This is the only question necessary to be considered.

The fifth instruction is as follows:

"But if defendant assaulted Speak, and Speak repelled the assault with more violence and more force than was necessary to defend and protect himself from the force offered by defendant, and was inflicting, or about to inflict, great bodily harm upon defendant, *such as would endanger his life*, or if defendant believed, and had reasonable grounds to believe, that Speak was then about to inflict great bodily harm upon him, *such as would endanger his life*, and he had no other apparently safe means of escaping therefrom, then he had the right to use such force and such means, and no more, as was necessary to save himself from such impending danger; and if Frank was killed by the use of such means, the defendant is excusable, and should be acquitted."

By this instruction the jury were, in effect, told that the defendant had no right to shoot in his self-defense, unless the bodily harm which was being or about to be inflicted upon him *endangered his life*. This is not the law of self-

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defense. Whenever a man is in imminent danger of *great* bodily harm, or it is being inflicted on him, whether it endangers his life or not, he has the right to use such force as appears to him, in the exercise of a reasonable judgment, to be necessary to repel, or deliver himself from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him.

While putting out an eye, cutting off an ear, slitting the nose, bruising the body, or choking a man with great violence, may not endanger his life, still he has the right to use such force, even to the taking of life, as may be reasonably necessary to prevent or rid himself of imminent danger of the unlawful infliction of such injuries upon him.

The court erred in limiting the degree of bodily harm to such as endangered the defendant's life, and to that extent only the instruction quoted was erroneous.

We quote the sixth instruction, which is: "If the jury shall believe from the evidence that the time the pistol was fired by the defendant the fight between defendant and Speak had ended, and that defendant had no intention of using it in the fight, or of renewing the fight with Speak, but was holding it merely as a weapon of defense, and it was discharged by accident, and not designedly or recklessly on the part of defendant, and by such discharge Frank was killed, the defendant is excusable, and should be acquitted."

Instruction No. 3, taken in connection with the one quoted, excludes the defendant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure any one thereby. For if, after the conflict had ended between defendant and Speak, the

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pistol was accidentally fired, resulting from the recklessly careless use of it by the defendant, in view of the facts of this case, he was guilty of manslaughter, but not of murder, and the jury should have been so instructed. (Chrystal v. Commonwealth, 9 Bush, 671.) There was no instruction given presenting this view of the case to the jury.

We see no other error in any of the instructions given.

Wherefore, the judgment is reversed, and cause remanded for a new trial.

 CASE 95—EQUITY—SEPTEMBER 28, 1881.

Phillips v. Breck's ex'r.

79	465
108	275

APPEAL, FROM LEE CIRCUIT COURT.

1. It was neither necessary nor proper that the executor should aver that he was able and willing to convey the title to the land sold by the decedent, as the will gave him no power to do it.
2. The devisees were, in this state of case, necessary parties, and to authorize a judgment of sale against the vendee, it must be averred that they were able and willing to convey a good title to the vendee.
3. If the devisees be infants, or refuse to convey, an averment by the executor of the contract, the character of the title the testator bound himself to make, and that the infants or those refusing to convey had a good title, or such title as the testator agreed to convey, must be made.

S. F. J. TRABUE, W. LINDSAY, AND A. DUVALL FOR APPELLANT.

Appellee's pleadings show title in the testator at the time of his death, and failed to show title either in his executor, or devisees, or heirs at law. It was error to render judgment for the sale of the land. (3 Bush, 187.)

ISAAC N. CARDWELL FOR APPELLEE.

1. No error was committed by the court to the prejudice of appellant.

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2. The court ordered appellee to make decedent's devisees parties against his protest. Appellee contends that the will gave the executor ample power to convey the land. (Judge Breck's will, p. 38.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

In none of the pleadings filed by the executor, heirs, or devisees is it alleged that the title to the "Yellow Rock" tract of land is in the devisees of Daniel Breck, deceased.

The right of action was in the executor for whatever sum the appellant may be indebted to his testator for the lands sold by the latter to him, and for which the appellant holds the bond of the testator for title. But it was not necessary or proper that he should aver he was able and willing to convey the title which his testator had covenanted to convey, for the manifest reason that he had no power under the will of the testator to make a conveyance. And as he could not therefore tender a sufficient title, because the devisees held it, they were properly brought before the court, and should be compelled to convey in the event the executor makes out his cause of action.

But making them parties and their appearance did not dispense with the necessity of an allegation by them or the executor *that they had a good title to the land* described in the title-bond of their devisor, because the title might be defective, or they may have parted with it since it came to them.

It is essential to a recovery in a case of this character for the vendor, or, if he be dead, for his heirs or devisees, to allege, and prove if not admitted, the terms of the contract, the character of title to be made, and their ability and willingness to convey, except the heirs or devisees be infants, or refuse to convey; as to such an allegation by the executor of the terms of the contract, the character of title his testator agreed to make, and that the incapacitated or retal-

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citrant heirs or devisees *had a good title to the land, or such a title to it as the testator had agreed to convey*, and that they either lacked capacity or refused to convey, as the case may be, will be sufficient to authorize the court, when they are properly brought before it, to compel them to convey.

In all such cases as this it must be averred by either the executor or devisees *in whom the title rests*, that fact being essential to the formation of a material issue in the case, should there be any dispute about it. (5 Littell, 8; 3 Bush, 187; 12 Bush, 104.)

The pleadings were insufficient to authorize a recovery on the notes executed for the Yellow Rock tract of land.

The preponderance of the evidence is, that the appellant's true signature is attached to the paper filed by the executor as evidence of a settlement and the amount of payments made by the former to the testator.

The court below having so decided, we do not see how we can disturb its conclusions.

The alterations in the paper do not change its legal sense, and are therefore not material, and we do not think that the substantial rights of the appellant have been affected by its admission, notwithstanding the executor did not testify upon that question, and the paper was produced by him.

There is no evidence that he altered it.

And we have seen the alterations added nothing to his interest, but hazarded the value of the paper as evidence. It cannot be presumed that he would have committed such an act without motive, and against his own interest.

Wherefore, so much of the judgment as is for the sale of the Yellow Rock tract of land, and for the amount of the notes executed for it, is reversed, and cause remanded, for further proper proceedings.

Chisholm v. Gooch, &c.

CASE 96—ORDINARY—SEPTEMBER 28, 1881.

Chisholm v. Gooch, &c.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

1. The object of sections 641 and 643, Civil Code, is to simplify proceedings under executions, and to prevent circuity of actions.
2. The claimant or purchaser of personal property sold under execution has his action upon the indemnifying bond executed by the plaintiff, or he may sue the officer upon his official bond, if he has made himself liable by failing to take good security and return the bond as directed in these sections.

J. S. & R. W. HOCKER FOR APPELLANT.

1. The court erred in sustaining the demurrer to the original and amended petitions.
2. The appellant has a clear right of action under the 641st and 643d sections of the Civil Code. (Green v. Hackley, 3 Met., 389; Rudy v. Johnston, 11 Bush, 546; Anthony v. Wade, 110.)

WELCH & SAUFLEY FOR APPELLEES.

By section 643, Civil Code, the officer escapes responsibility from the claimant by taking of the bond with good security and returning it. If either is not performed, the officer is responsible. (Green v. Hackley, 3 Met., 389; 11 Bush, 546.)

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment sustaining a general demurrer to the petition in an action upon an indemnifying bond by the claimant of property sold under execution.

The objection to the petition is, that it does not show the indemnifying bond was returned by the officer who took it; that in consequence of his failure to return the bond, the officer is himself liable to the claimant of the property sold, and being so, the obligor is not.

The object of sections 641 and 643 of the Civil Code is to simplify proceedings under executions, and prevent multiplicity and circuity of actions—not to increase the

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responsibility of officers or lessen the liability of plaintiffs in execution.

Before the adoption of the Civil Code the officer might, in certain cases, require of the plaintiff in execution an indemnifying bond, but was still liable to be sued by the defendant in execution or claimant of property sold: having, in case of recovery against himself, to look to the plaintiff in execution for indemnity upon his bond.

Now the claimant or purchaser of any property for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property, if the surety in the bond was good when it was taken, and such claimant or purchaser may maintain an action upon the bond, and recover such damages as he may be entitled to. But it was not intended that the claimant or purchaser should not have the right of action upon the bond in case the officer made himself liable by failing to return the bond or take good surety. They may still maintain an action against the officer upon his official bond when he has become liable, or against the obligor in the indemnifying bond. There is no reason why the claimant or purchaser may not immediately have an action against the obligor in the indemnifying bond who directed and caused the levy and sale of the property, nor is it inhibited by the Civil Code.

Wherefore, the judgment of the court below sustaining the demurrer to the petition is reversed, and the cause is remanded, with directions to overrule the demurrer, and for other proceedings consistent with this opinion.

Biggs, &c., v. Lexington and Big Sandy Railroad Company.

CASE 97—EQUITY—OCTOBER 1, 1881.

79 470
108 109

Biggs, &c., v. Lexington and Big Sandy Railroad Company.

APPEAL FROM BOYD CIRCUIT COURT.

1. Where a deed does not contain any warranty of quantity, the remedy of a grantee for a deficit is based on an implied assumpsit of the grantor to refund the money paid by mistake.
2. An assignment of the warranties in a deed which does not contain any warranty of *quantity* does not carry with it the cause of action on the implied promise of the original vendor to render compensation for a deficit in the quantity of land.
3. Such an action is barred by the lapse of five years from the discovery of the mistake as to quantity, if payment was made before that event.
4. Where a suit is instituted to settle a decedent's estate, and the creditors, as provided by section 436 of the Code, are enjoined from suing on their demands except in that proceeding, the time of the continuance of the injunction is not to be excluded in estimating the period limited for the commencement of an action by a creditor, as the injunction does not stay his action, but only prescribes where and how he shall proceed.

E. F. DULIN FOR APPELLANTS.

1. The cause of action for a deficit in the land was not assigned to appellee, nor could it have been assigned so as to enable appellee to sue without joining the assignors.
2. If appellee ever had any right of action, it is barred by limitation. (Gen. Stat., chap. 71, art. 3, sec. 2.)
3. So much of the land conveyed by Biggs as was in the adverse possession of others should have been deducted, as the contract to that extent was void. (Wash v. McBrayer, 1 Dana, 565; Redman, &c., v. Sanders, &c., 2 Dana, 70; Rust v. Larue, 4 Littell, 413; Thompson v. Warren, 8 B. M., 490; Graves v. Leathers, 17 B. M., 668 and 669; Crawley v. Vaughn, 11 Bush, 521.)

WM. LINDSAY FOR APPELLANTS.

1. The action is for the recovery of money paid by mistake, and is barred by the lapse of five years from the act of payment, unless the defendant shows that the mistake was discovered within five years before the commencement of the action. (Crane v. Prather, 4 J. J. Mar.,

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- 76; Dye v. Holland, 4 Bush, 635; Carneal v. Perkins' adm'r, 7 J. J. Mar., 455; Field v. Wilson, 6 B. Mon., 481; Ellis v. Kelso, 18 B. Mon., 301.)
2. The assignment to appellee of the warranties in Biggs' deed did not carry with it the right of action for the alleged deficit.
 3. When Hartman and Coleman abandoned the action they left appellee without a right of action, and when they came back into court they, in effect, commenced a new action. (Dudley v. Price's adm'r, 10 B. Mon., 88; Clarkson v. Morgan, 6 B. Mon., 451; Stone v. Connelly, 1 Met., 656.)
 4. There can be no relief on account of the deficit, as the use in the deed of the expression "supposed to contain 3,700 acres, be it more or less," is evidence that the parties intended to risk a gain or loss. (Young v. Craig, 2 Bibb, 271; McCoun v. Delaney, 3 Bibb, 46; Harrison v. Talbott, 2 Dana, 266; Brown v. Parish, 2 Dana, 6.)

L. T. MOORE AND W. H. WADSWORTH FOR APPELLEE.

1. The assignment of error that "the judgment rendered is erroneous," is too general to be considered. (Sec. 756, Civil Code; O'Reagan v. O'Sullivan, 14 Bush, 184.)
2. The action is not barred by limitation, as the statute run against claims of creditors after suit was instituted by the administrator and the injunction obtained. (Revised Statutes, 2 Stanton, p. 134; Daniels' Chancery Practice, vol. 1, 4th ed., 641-644, and notes.)
3. The action was instituted in five years after the discovery of the mistake, and appellee being the real party in interest, the dismissal of Coleman and Hartman from the action did not cause the statute to commence running again.
4. For so gross a deficiency in the quantity of land conveyed equity will relieve. (Harrison v. Talbott, 2 Dana, 258, and cases cited; Lewis v. Burton, MS. Opin., January 6th, 1877; Fall v. McMurdy, 3 Met., 365.)

IRELAND & HAMPTON FOR APPELLEE.

Filed a petition for rehearing.

1. The statute of limitations does not apply to any claim of a creditor of a deceased person not barred at the institution of suit by the administrator to settle the estate. (Daniels' Chancery Practice, p. 644, at top, and notes; Angell on Limitations, sec. 167; Wickliffe v. Lexington, 11 B. Mon., 161; L. L. F. & M. Ins. Co. v. Page, 17 B. M., 446; Clay v. Clay, 7 Bush, 98; Talbott v. Todd, 5 Dana, 190; Pilkington's ex'x v. Gaunt's adm'x, 5 Dana, 410; Kane v. Bloodgood, 7 Johnson Ch'y Reports, 106.)
2. Limitation only bars the right of a party to bring an action, and does not bar his right to present his claim in an action by a personal representative to settle his decedent's estate. (Stanton's Revised Stat.,

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- vol. 2, pp. 126 and 132; Myers' Code, secs. 33, 65, 465, 467, and 731; Graves v. Graves, 2 Bibb, 207; Chiles v. Calk, 4 Bibb, 454.)
3. Appellee's claim is based upon a covenant in writing, and not upon an implied promise, and therefore the limitation of five years does apply.
 4. Appellee is the real party in interest, and was not affected by the discontinuance of the action as to Coleman and Hartman.
 5. An amendment relates back and forms part of the original complaint. (Lovenjana v. Carmillo, 45 Cal., 125; Bradford v. Andrews, 20 Ohio St., 208; Horton v. Banner, 6 Bush, 597; Hyatt v. Bank of Kentucky, 200.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

In consideration of \$60,000, payable in different installments, on or before March 7, 1866, R. M. Biggs, deceased, by written contract, sold and agreed to convey by general warranty deed, to Hartman and Coleman, five parcels of land, which were stated as "containing three thousand and seven hundred acres."

The writing embraced this stipulation: "The lands are to be surveyed, and if they run short, the said Biggs is to make a deduction in proportion, and if they overrun, the said H. and C. are to pay in proportion."

On the 24th of February, 1866, H. and C. solicited and accepted a quit-claim deed from Biggs and wife conveying to them four instead of five parcels of the land mentioned in the written contract, and acknowledging payment of the consideration.

By a similar deed, dated April 11th, 1866, Hartman and Coleman and *James M. Baily* conveyed said lands and some other small parcels to the Western States Coal, Oil, and Mining Company, in consideration of \$249,000 in hand paid.

Thereafter, on the 15th of February, 1867, Biggs and wife executed a second deed to H. and C., with covenant of

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general warranty, for the four parcels of land described in their deed of February 24th.

The Western States Coal, Oil, and Mining Company, by quit-claim deed, dated the 19th of February, 1869, conveyed the lands purchased by H. and C. from Biggs to the appellee, the Lexington and Big Sandy Railroad Company.

On the 30th of April, 1869, Hartman and Coleman and Baily, in writing, assigned and transferred to the appellee company *the warranties* contained in the deeds from Biggs to them, and all rights or causes of action they then or thereafter might have by reason of the breach of any of the *warranties* or *covenants* contained in Biggs' deed to them.

Biggs having been killed by the explosion of the boilers of the steam-boat Harry Dean, James L. Warring was, at the June term, 1868, of the county court, appointed his administrator.

On the 27th of October, 1868, the administrator filed his petition in equity to settle his intestate's estate, the personality of which he alleged was insufficient to pay his debts.

He described the lands of the estate, prayed to have enough of them sold to pay the debts, and "that all claimants be enjoined and restrained . . . of all suits and proceedings on any of their demands, *except by proceeding herein.*"

November 2, 1869, the appellee company filed a petition setting forth a claim for a large deficit in the lands deeded by Biggs to Hartman and Coleman, whom it joined in the petition by their alleged consent.

It based its claim to the value of the deficit on the above-named assignment to it by Hartman and Coleman. The suit progressed until November 13th, 1871, when Hartman and Coleman appeared, and on their motion had the cross-

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petition of the appellee company discontinued as to them, and they were dismissed as plaintiffs in said cross-petition.

On the 28th of October, 1873, they joined the appellee company in an amended petition, alleging that they were dismissed as plaintiffs in the petition seeking to recover for the deficiency, "upon the idea that said cause of action was vested in the Lexington and Big Sandy Railroad, Eastern Division," and asked "to be reinstated as co-plaintiffs in the petition setting up the claim."

They were accordingly reinstated as co-plaintiffs with the railroad company.

During that term of court the appellants, the administrator, widow, and heirs of Biggs, filed an amended answer, pleading in apt language the statute of five years' limitation to the cause of action for the alleged deficit.

Upon hearing the cause, the court below rendered judgment in favor of the appellee company against the appellants for the sum of \$19,400, with interest from the 24th of February, 1866, for the deficiency, which was adjudged to be 1,197½ acres, and they have appealed to this court asking a reversal of that judgment.

There are several imposing grounds urged by appellants for a reversal upon the merits of the case, but none of them will be considered in this opinion, as the plea of limitation in our judgment presents a complete bar to the recovery for what deficit soever there may be.

The general principle of law authorizing an action for compensation for a material deficit in lands sold under a mistake as to the quantity was long since well established, but the right of recovery greatly depends upon the nature of the purchase, the circumstances, knowledge, and conduct of the parties.

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This right of action is based upon the contract which the law implies as the result of justice and reason growing out of the mutual mistake of innocent parties, and is barred by the lapse of five years from the discovery of the mistake, if payment be made before that event. (*Dye v. Holland*, 4. Bush, 636.) Payment and the discovery of the mistake must concur before a recovery can be had.

Under the rule that, at the instant the cause of action accrues, limitation begins to run, it starts on its course from the moment of payment, as the cause of action then accrues; but our statute and adjudications restrain its operation upon the cause until the mistake shall be discovered, if that occurs within ten years after the contract.

Here the mistake was discovered in June, 1867.

From the death of Biggs to the appointment of his administrator, and for six months thereafter, less than one year expired.

Deduct that period from the time which elapsed from the discovery of the mistake to the reinstatement of Hartman and Coleman as plaintiffs, and it will be seen that more than five years and four months are left, which sustains the plea of limitation, unless the cause of action had been assigned to the appellee company by Hartman and Coleman, or if not assigned, they were obstructed in their right to sue by the injunction obtained at the commencement of the administrator's suit to settle his intestate's estate.

The unambiguous language contained in the paper evidencing the assignment must control this question, as neither fraud nor mistake in its execution is sufficiently shown by the evidence, and without such evidence, parol testimony is incompetent for the purpose of contradicting or explaining it.

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The assignment specifically transfers the benefit of the warranties and covenants contained in Biggs' deeds, and any cause of action that had or might accrue by reason of their breach.

Neither of the deeds contains any warranty of *quantity*. The lands are described in them by metes and bounds, and "supposed to contain in the whole thirty-seven hundred acres, be it more or less."

It is true that any cause of action arising on the warranties would run with the land and pass by similar deeds, but the action to recover compensation for the deficit could not arise from the breach of any warranty or covenant in either of the deeds named, for the simple reason that there is no undertaking or warranty in them that the lands contained the quantity mentioned.

Besides, this court has held too often that the remedy for a deficit, where such deeds as these exist, is based on an implied assumpsit to refund the money paid by mistake that results from ignorance, accident, or confidence. (*Crane v. Prather*, 4 J. J. M.; *Dye v. Holland*, 4 Bush; *Young v. Craig*, 2 Bibb; *Harrison v. Talbott*, 2 Dana, and cases therein cited.)

The cause of action, therefore, on the implied promise to render compensation for the deficit, remained with Hartman and Coleman, as no assignment thereof to the appellee company is shown to have been made.

Whether they can be allowed to deduct any time by reason of the grant of the injunction at the instance of the administrator, and thus reduce the period below the requisite of the statutory bar, is the only remaining question of importance urged by counsel that need be touched.

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While the British authorities relied on to sustain appellee's view go far to support it, yet the English chancery practice, formed under the influence of English statutes and institutions, has never been fully adopted in this state. Counsel contend that section 12, article 4, chapter 71, General Statutes, is conclusive of this point.

A part of that section reads:

"When . . . the commencement of an action is stayed by injunction, the time of the continuance of the injunction is not part of the period limited . . . for the commencement of the action."

In point of fact, were this section applicable to the question before us, we hardly see how Hartman and Coleman have placed themselves within its protection against the lapse of time pleaded. For they appeared in connection with the railroad company, and actually asserted the claim on November 2d, 1869, and afterwards voluntarily abandoned its prosecution until October 28th, 1873. Certainly the commencement of their action was not stayed beyond the time at which they first presented it, and this did not result from the injunction, because it is alleged in their first pleading, that "the *delay* in presenting this claim arises from the facts that the company, petitioning only within a few months past, became entitled to the right herein asserted," and that Hartman and Coleman resided in Pennsylvania.

And there is no evidence in this record that shows they were laboring under the mistaken belief that the injunction would be violated by their instituting a suit on the claim in the action brought by the administrator.

The prosecution of suit upon their claim in this action was embraced in the exception stated in the prayer of the administrator's petition, which, in effect, asked that all claimants

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be not only permitted but required to prosecute their claims in the proceedings for the settlement of the estate.

The injunction granted did not stay appellee's action; it only prescribed where and how he should institute it.

The power to grant such an injunction is given by the 436th section of the Civil Code, and its provisions are founded on principles of equality and justice, and is intended to prevent a multiplicity of suits where one will furnish a remedy to all parties who may be interested.

In the case of Barnes, &c., v. Green, &c., MS. Opin., September, 1881 (by Judge Pryor), this court sustained the plea of limitation where an injunction had been granted against suits of creditors at the instance of the administrator, on his filing a petition for settlement of the estate.

With these views of the law of this case, the exclusion and admission of evidence specified in the assignment of errors was prejudicial to the appellants' rights, and forms a reversible error, as the court might and ought, with the illegal evidence excluded and the relevant evidence admitted, to have rendered judgment rejecting the claim for the deficit on the plea of limitation.

As the plea of limitation is fatal, we are constrained so to decide, and forego an adjudication upon the merits of the controversy.

Wherefore, the judgment is reversed, and cause remanded, with directions to sustain the plea of limitation and dismiss appellee's cross-petition.

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APPEAL FROM UNION CIRCUIT COURT.

1. A party who sees an obligation with his name signed to it without his authority or consent, yet tells the obligee that the signature is his and he is bound by it (the representation resulting in the obligee forbearing to sue until the principal becomes insolvent) will be estopped to say afterwards that it is not his act and deed.
2. Reason and the policy of the law forbid that a party who is apparently an obligor should assert that he is such, and bound by his obligation, and afterwards escape the debt by his plea of *non est factum*.

SPALDING & SPALDING AND W. LINDSAY FOR APPELLANT.

To make out an estoppel *in pais* it must be shown—1. That the party sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another. 2. That the other party has acted upon, or been influenced by, such act or declaration. 3. That the party will be prejudiced by allowing the truth of the admission to be disproved. (Washburn on Real Prop., 74; 30 N., 541; 102 Mass., 201; 27 Wis., 566; 49 N. Y., 111; 38 Ills., 145; White & Tudor's Lead. Ca., part 1, vol. 2, 30; 18 Wall., 271; Sneed's Rep., 102; McAdams v. Howes, 9 Bush, 23.)

S. B. VANCE AND D. H. HUGHES FOR APPELLEE.

1. The alleged errors of the court relied upon for a new trial must be specified.
2. Appellant is estopped to deny his responsibility upon the note. His representations to appellee caused him to forbear to sue until the principal was insolvent. (Forsyth v. Banta, 5 Bush, 47; 63 Ills., 403.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment rendered in the Union court of common pleas in an action by the appellee against the appellant and others on a note for five hundred and seventy-six dollars.

The note is payable to the appellee, and was executed by A. G. Robinson as principal, and purports to have been

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executed by the appellee Rudd and his co-obligees as the sureties. Robinson, the principal, died in February, 1879.

The note was dated on the 28th of May, 1878, and made payable in twelve months thereafter, and this action was instituted upon it in about twelve months after its maturity. The defense relied on by the sureties was the plea of *non est factum*, and the appellee, to avoid this defense, pleaded an estoppel as to the defendant Rudd, in substance as follows:

He alleged that after the execution of the note, and while Robinson, the principal, was living, and with ample property subject to execution to have satisfied the debt, the defendant Rudd told the plaintiff he had signed the note and would remain bound until it was discharged; that relying on these admissions and the promises of the defendant, he failed to take any legal proceedings in order to make his debt out of the principal; that other creditors in the meantime collected by legal proceedings, about that time and shortly after, several thousand dollars on their claims out of the property of his principal, and that his debt could or would have been made or secured but for the representations and statements made by the appellant that his signature to the note was genuine.

There is no direct averment that in making the admission it was the purpose or intention of the appellant to mislead the appellee, or that the latter should act on the statement made; still the appellant, in his rejoinder, avers that the admissions were not made with the intention or purpose of inducing the plaintiff to forbear to sue or to treat the note as not due; that he intended no wrong or fraud on plaintiff. To this rejoinder the appellee says that the defendant acknowledged his signature to be genuine and promised to pay

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the note; and thereby the plaintiff was lulled into security, and caused him to forbear to resort to legal remedies for the collection of his debt, &c.

There was no demurrer to any of the pleadings, and we think the issue was properly presented when considering the entire pleadings filed by each party.

The testimony conduces to show that Robinson had been using the names of his friends on his paper without any authority, and that the appellant called on the appellee to know what had become of a \$1,000 note he held on Robinson, and for which he was bound as surety, and was told by the appellee that the note had been paid. He was at the same time informed by the appellee that he held this note in controversy on Robinson, for which he was bound as surety, and appellant responded that it was all right; and it seems in a short time after this, at his instance, the note was handed to him for inspection, and he said it was his signature and proposed to make some arrangement to pay it. His recognition of his liability is also shown to have been admitted by him in various ways.

It seems that Robinson had signed appellant's name as surety to certain county bonds without any authority, and when examining these bonds he pronounced them forgeries, and said the only note he was on as surety was a note to the appellee for five hundred and fifty or sixty dollars. The proof of the admissions and representations made by the appellant, as shown by the testimony of the appellee, is corroborated by appellant's own testimony. He says he did admit he signed the note, but that he was often in such a condition, when under the influence of liquor, as to prevent him from comprehending the nature of business trans-

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actions, and when he made the admissions he had reference to some other note for a smaller amount for which he was liable.

The appellant is an illiterate man, and can only write his name. His clerk in a drug store owned by appellant testifies that the signature of appellant is not genuine, and the same statement is made by others familiar with his signature. The decided weight of the testimony as to the signature is that it is not genuine.

The jury made various special findings in response to interrogatories propounded by the court at the instance of counsel, and also returned into court a general verdict for the appellee.

The special finding for the plaintiff (*appellee*) was: "We, of the jury, find that the defendant, in interviews with the plaintiff, before the maturity of the note sued on, was informed by plaintiff of the amount of the note, and about the time of its date, and that his (defendant's) name was to said note as the surety of Robinson, and that the defendant admitted his signature thereto was genuine, and agreed to pay it or see it paid; and the defendant relied on the promise and admission as true, and forbore to take action against Robinson, whereby he could have made or secured said note, had defendant disclaimed his liability thereon.

The special findings for the defendant were:

1. That he did not sign the note, or authorize any one to sign it for him.
2. That defendant made said admissions and promise in ignorance of the fact that his name on the paper was not his genuine signature.

The defendant entered his motion for a judgment on the special findings, and the motion was overruled.

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The only question presented in the record necessary to be considered arises on the special finding to the effect, that when the admissions were made the appellant was mistaken as to the genuineness of the signature and his liability for the debt.

It is insisted by counsel for the appellant—

1. That the rule is: "The person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the title he proposed to set up."

2. "That the other party has acted upon, or been influenced by, such act or declaration that the party will be prejudiced by allowing the truth of the admission to be disproved."

These rules are recognized in the elementary books, and we see no reason for denying their application in a case like this. That the appellant, when he made the admissions as to his signature, had reason to believe that it would influence the conduct of the appellant, is evident, and that he made the admissions for the purpose and with the intention of quieting his apprehensions as to the security for his debt, is equally certain; and being satisfied with his security, as the jury find and as the evidence conduces strongly to show, made no effort to collect his debt of Robinson, whilst other creditors were proceeding to realize by legal process the payment in full of their demands.

In this case the note was signed when delivered by the principal obligor to the appellee, and relying on the integrity of the former, he accepted the note and loaned his money. When the liability of the surety was questioned, his only mode of ascertaining the facts upon which he could rely

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was to see the surety, and when informed by him that his signature was genuine, he had the right to look to him for payment; and when trusting as to the truth of the admissions and promises made, he has indulged the principal, or failed to take coercive measures to collect his debt, when it could have been made, the surety should be denied the right to disprove the truth of his own statements, so as to avoid liability.

The representation was made that it might be acted upon, and to assure the plaintiff at least that his note was genuine. It is certain from the proof in the cause and the finding of the jury that the appellee acted on the representations and admissions made by the appellant, and that this action, influenced by the conduct of the appellant, caused him to lose his debt.

In the case of Casca Bank against Keene, 53 Maine, it was adjudged that one who adopts a signature, knowing it to be forged, is estopped from denying its genuineness. In the case of Heffern v. Dawson, 63 Illinois, the proof showed that the surety, by his admissions and declarations, "*the note was all right, and if the plaintiff would hold still, he would pay him,*" authorized the conclusion that the surety designedly induced the plaintiff to omit to take measures to collect the same from the other maker when he was solvent.

In the case of Forsythe v. Burton, 5 Bush, this court went so far as to say that a mere ratification of an unauthorized signing of a party's name to a note as joint obligor works an estoppel. While the mere ratification of a void contract may be regarded as without any consideration, and the soundness of the rule laid down in Burton v. Forsythe properly questioned, still in the case before us there is not

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only a ratification but an express admission that the signature to the note was that of the surety.

Under our present statute, the authority to sign the name of one to a note as surety must be in writing, and in *Moxley v. Ragan* this court held that proof of a promise to pay by the surety, when the note was signed without authority, would lead to the same evil that the statute was intended to remedy, and therefore held the testimony incompetent, and the promise not obligatory. In that case, if the party had admitted his signature was his own, the question would have been entirely different.

It is argued here that the proof of the many recognitions by appellant of his liability and the genuineness of his signature indicates a persistent effort to entrap appellant so as to fix upon him a liability as surety. This might be, but for the special finding and the testimony of the appellant himself. He says, "he recollects to have had the note in his hands, and looked at it, and perhaps had other conversations when the note was not exhibited, and in some of the conversations might have told plaintiff his name was on the note and the signature was his; that he had signed it or put it there, and the note was as good as the bank."

He further says he thought the note was for \$250. It was proven by the appellant on the trial and a number of witnesses that it was not his signature, and why he did not know that fact when the note was produced to him, and when he was investigating the forgeries committed by Robinson, is left unexplained, unless he was too much intoxicated at each conversation to know the effect of his conduct and action. It is argued, however, that the jury, by their special finding, have determined that when he admitted the signing of the note he did so under a mistake as to his own

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signature ; and if acting in good faith, as the special finding establishes, he is not liable.

Ordinarily there must be a purpose or intention to deceive or mislead so as to work an estoppel. "It is not necessary, in order to create an equitable estoppel, that the party should design to mislead. It is sufficient if the act was calculated to mislead, and actually has misled a person acting upon it in good faith, and who exercised reasonable care and diligence under all the circumstances, and effectually estops the party from averring a state of facts different from what the party acted upon." (Hermann on Estoppel, page 418.)

"It seems to be settled that a party's ignorance of the truth of the representation made will not remove the estoppel, if he was bound to know the fact, or if his ignorance is the result of his gross negligence." (Bigelow on Estoppel, 476.)

Now the appellant is presumed to know his own signature, and the holder of this note, when put upon inquiry as to its validity, and in the exercise of the utmost diligence, has gone to the party, and the only party whom he had the right to suppose could speak the truth as to the existence of the fact he was endeavoring to ascertain. He saw the appellant, and was informed by him that the signature was genuine. This, as the jury have found, induced him to forbear to sue, and to rest quietly as to the appellant's liability. Now, after such acts and admission, is not the appellant in good conscience, law, and morals estopped to plead *non est factum* to the paper? We think he is.

Parke, B., says, in discussing this question, "and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant he should act upon it,

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and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." (See note 1, page 487, Bigelow on Estoppel.)

The party must mean his representation to be acted upon, and when it is acted upon, as in this case, and works an injury, the party making the admission is estopped to deny the truth of his own statement. The facts of this case show that appellee was influenced to rely on the ability of the appellant to pay, and that his forbearance to sue the principal was caused by the admissions made; that appellant purposely caused the appellee to look to him for payment upon promises made to pay the debt, and his acknowledgment time and again that his signature was genuine.

Judgment affirmed.

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Humphrey v. Hughes' guardian, &c.

APPEAL FROM NELSON CIRCUIT COURT.

1. A party to the action may, in the discretion of the court, withdraw any pleading filed by him, where it works no injury to his adversary.
2. In an action by the assignee against the assignor of a note, it is necessary to aver the consideration paid for the assignment.
3. The recovery is limited to the amount actually paid.

MUIR & WICKLIFFE FOR APPELLANT.

1. The petition is insufficient. Appellee failed to allege the consideration paid for the assignment.
2. The statute is conclusive of this question. (Gen. Stat., chap. 22, sec. 7; Civil Code, sec. 134; 7 Bush, 379; 2 J. J. Mar., 140; 10 Johnson, 104; 1 Met., 643; 2 Bibb, 424; 16 B. Mon., 343; 1 Duv., 301; 1 Bibb, 595; 1 Mar., 544; 2 J. J. Mar., 190; 3 *Ib.*, 260; 6 B. Mon., 530; 16 *Ib.*, 344; 4 Met., 300.)

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C. A. WICKLIFFE FOR APPELLEE.

1. It is a rule that a party may withdraw any pleading, provided it works no injury to his adversary.
2. The court committed no error in holding the petition good. It is a clear case of a trust. (4 Bibb, 301; Civil Code, 134; 1 Mar., 478; Adams v. Hodges, 1 Mon.; Downing v. Bacon, 7 Bush, 685; 1 Met., 342; 1 Mar., 479; 3 Mon., 125; 3 Bibb, 110; Civil Code, 98; Perry on Trusts, secs. 454, 453, 455, 460, 459; Schooler's Domestic Rel., 473; Gen. Stat., chap. 48, art. 11, sec. 19; 7 J. J. Mar., 239; 3 Met., 554; 7 Bush, 387; 13 Ib., 119; 2 Bibb, 35; 6 J. J. Mar., 68.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Humphrey, the former guardian of Litney Hughes, had a settlement of his accounts with the (then) guardian, J. R. Miller, and was indebted to his ward in the sum of about \$320. He had loaned the ward's money to Smith and Lancaster, and held their joint note for the amount; and as a payment in full of all the demands against him as guardian, he assigned this note to Miller.

Miller instituted an action at law on the note, prosecuting it with all the diligence required of an assignee, and failed to make the debt, as is evidenced by a return of no property found made by the sheriff in whose hands the execution was placed.

He then filed his petition, seeking as assignee to recover of the appellant by reason of the assignment and the insolvency of the obligors to the note. No other claim is asserted, or any other cause of action mentioned.

The appellant filed an answer, in which various defenses are relied on, and to this answer a demurrer was filed. The *demurrer* was subsequently withdrawn by the plaintiff against the objection of the appellant. A party to an action has the right, or at least it is within the discretion of the court, to permit any pleading to be withdrawn, unless it works an injury to his adversary. The demurrer in this case went

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back to the petition, and as there was no allegation in that pleading of any consideration paid for the note, nor any damages alleged to have been sustained, either general or special, there was no cause of action presented, and in construing the pleading most favorably to the party making it, the recovery would have been merely nominal.

By section 7 of chapter 22, General Statutes, it is made necessary, in an action on an assignment, to aver the consideration for the assignment, and the recovery is limited to the amount actually paid. During the progress of the trial, the appellee filed an amended petition in the name of the ward, in which it is alleged that the appellant, as her former guardian, had failed to account for the moneys in his hands, and asked for judgment.

This amendment ought not to have been allowed. It was a departure from the original cause of action by Miller, and the two counts could not have been united; but after permitting its filing, the court should have sustained the motion of the appellant, and required the appellee to elect which cause of action he would prosecute.

The pleadings in the action on the assignment show that the appellant and Miller had a settlement of all the accounts of the former as guardian, and that Miller accepted the assigned note in full discharge of the demand, and executed a receipt to that effect. This is binding on the appellee Miller, and his remedy is against the appellant on the assignment, unless the appellee can avoid the settlement, and cancel the receipt on some equitable ground. The appellee must prosecute his action on the assignment, and with this view he should be allowed to amend his petition, or it should be dismissed without prejudice.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

 Parrott, &c., v. Kelly, &c.

2r 490
4r 31379 490
113 878

CASE 100—EQUITY—OCTOBER 4, 1881.

Parrott, &c., v. Kelly, &c.

APPEAL FROM WASHINGTON COURT OF COMMON PLEAS.

1. Husband and wife join in a conveyance of the wife's real estate to her sister, with the object of having it reconveyed by her to the wife, with power to dispose of it by will or otherwise, and it was so conveyed. The wife devised it to her husband.
2. The title passed by the devise.

JOHN W. LEWIS FOR APPELLANTS.

1. The statute recognizes the conveyance of the wife's land in connection with the husband, but denies the power to make a will by her.
2. The power of the owner to dispose of property after death is not by natural laws, but by positive institutions of society. (Gen. Stats., chap. 113, sec. 2; *Ib.*, sec. 4; *Ib.*, chap. 52, art. 2, sec. 3; *Ib.*, art. 4, sec. 17; *Moore v. Howe*, 4 Mon., 201; *Mitchell v. Holden*, 8 Bush, 363; *Bishop on Law of Married Women*, vol. 2, secs. 536-548; *Ib.*, vol. 1, secs. 37 and 715; *Kennedy v. Ten Broeck*, 11 Bush, 251; *George v. Bussing*, 15 B. Mon., 563; *Wilkinson v. Wright*, 6 *Ib.*, 577; 6 J. J. Mar., 573; *Kent's Com.*, vol. 2, 171-2; 1 *Roper on Husband and Wife*, 170; 1 *Williams on Ex.*, 40; *Broaddus v. Broaddus*, 10 Bush, 309.)

R. J. BROWNE FOR APPELLEES.

1. The deed from Ellery and wife to Mrs. Polin divested them of all title to the property.
2. The deed from Mrs. Polin to Mrs. Ellery conveyed it to her with its character changed from general to separate estate, with the power to dispose of it by will. Such conveyances have been frequently sustained by this court. (*Pate v. Joe*, 3 J. J. Mar., 116; *Tudor v. Tudor*, 19 B. Mon., 389; *Gen. Stat.*, 113, sec. 39; 2 *Stanton's Rev. Stat.*, 457; *Anderson v. Miller*, 6 J. J. Mar., 573; 9 *Dana*, 501; 6 B. Mon., 577; *Scarborough v. Watkins*, 9 *Ib.*, 540; *Mitchell v. Holden*, 8 Bush, 364.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The will of Catherine Ellery was admitted to probate in the Washington county court in the year 1877. At the date of the will, and when executed, in September, 1857, the testatrix was a married woman, the wife of John Ellery, and to whom she devised her whole estate. An appeal was

Parrott, &c., v. Kelly, &c.

prosecuted to the circuit court of that county from the order of the county court, and the probate sustained.

It seems from the facts contained in the record that Mrs. Ellery had no children, and was desirous of securing her estate to her husband, and in order to accomplish her purpose, she and her husband united in a conveyance to her sister, Mrs. Polin, of her real estate, expressing the consideration of love and affection, and the nominal consideration of one dollar in hand paid. Her sister then reconveyed the land to Mrs. Ellery for her separate use, to be held free from any claim of the husband, and also empowered her to dispose of it by last will and testament.

There is no charge of fraud or undue influence in the execution of either the deeds or the will of the testatrix, and the execution of each originated solely from the desire on the part of the wife that her husband should have the estate; and the only question is, was Mrs. Ellery, by the execution of these deeds, invested with the power to execute the will, and the absence of a valuable consideration in the conveyance of her estate to her sister is the sole reason urged for invalidating that instrument.

It is conceded that she had the right to convey this estate to her sister, and that a reconveyance to the husband or to the two jointly would have passed the absolute title, but that the right to devise the property, either under the express power given by the deed from the sister, or by reason of its being her separate estate, could not be conferred in that way.

In *Scarborough v. Watkins*, 9 B. Mon., and *Todd's heirs v. Wickliffe*, 18 B. Mon., and in the subsequent case of *Kennedy v. Ten Broeck*, this court held that conveyances made by the husband and wife for the purpose alone of hav-

Parrott, &c., v. Kelly, &c.

ing a reconveyance so as to vest the husband with the estate or an interest in it, were valid, and we see no reason why the wife may not be invested with the power to make a will in the same manner. As long as she is under the disability of coverture, she has no power to devise her general estate under our present statute, or to convey her real estate except in the manner prescribed by law; and, as was said in the case of *Kennedy v. Ten Broeck*, she cannot, by her own deed, or in conjunction with her husband, vest herself with any power over her estate.

In that case the wife attempted at one time to execute a power of attorney to the husband to sell and dispose of all of her estate, and in discussing that branch of it, this court held that such a power could not be created by the joint action of the husband and wife, but expressly held that a *feme covert* could be invested by deed or will emanating from a third party with a power of appointment in lands; and further, that the conveyance of Ten Broeck and wife to Barrett, the trustee, to enable him to reconvey to the husband and wife and the survivor, with no other motive than to vest the husband with an interest in the wife's land, was valid.

The husband and wife had the right to convey the land of the wife in the manner provided by the statute, and whether for a valuable or a mere nominal consideration, the title passed. There may be equitable grounds for cancelling the deed or will, but none exists in this case, nor could the question arise in such a proceeding.

The right of a *feme covert* to sue and convey or mortgage her estate for the benefit of the husband is not questioned; and the power of the husband and wife to sell and convey to a third party the land of the wife, that it may be recon-

South v. The Commonwealth.

veyed to the husband, has been repeatedly recognized by this court, and when the right to convey in such a manner is conceded, it seems to us determines the question before us.

The husband and wife in this case united in a conveyance of the wife's land, signed and acknowledged as required by law, passing to the sister of the wife the absolute title; and the latter being invested with the title, had the power to re-convey to the wife alone or to the husband and wife jointly, with such restrictions and limitations on the title as the parties might desire. If the title passed to Mrs. Nolin, she had the right to dispose of it so as to carry into effect the wishes of her sister; and that the title did pass has been too often decided by this court to require the citation of authority in support of it.

Mrs. Ellery had no children, and the execution of the conveyance having been prompted by the love and affection for her husband, free from any improper influences, it was proper to admit the will to probate.

Judgment affirmed.

CASE 101—INDICTMENT—OCTOBER 6, 1881.

South v. The Commonwealth.

APPEAL FROM GRAYSON CIRCUIT COURT.

1. A person may in the same indictment be charged with more than one violation of the "local option" law, but each offense must be specially charged, and the statement of the circumstances of each case be direct and certain.
2. A person who sells liquor for himself or another, or authorizes another to sell for him, may be guilty of violating this law; but he is not guilty if the sale be made by another, although done in

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his presence and at his solicitation, unless he be the owner of the liquor sold.

3. It is not necessary that the indictment under this act should allege the want of license.

J. P. HOBSON FOR APPELLANT.

1. The indictment is insufficient. (Young's case, 14 Bush, 161.)
2. The indictment charged but one selling. The court permitted proof of two.
3. The liquor sold was not the property of appellant.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. It is not necessary that the indictment should allege that appellant had no license. Under the "local option" law no license could be obtained.
2. The indictment charges an offense on a given day, "and at divers other times," &c.
3. Upon one conviction, appellant may be fined for each selling.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Under the indictment as found and presented, the defendant can be legally convicted of only one offense. The statement that he sold liquors "upon divers other days and times" describes no offense for which he may be tried. It follows, therefore, that instruction number one is erroneous so far as it authorizes the jury to find the accused guilty of more than one offense.

A person may in the same indictment be charged with more than one violation of the local option law, as it is called; but each offense should be separately charged, and the statement of the particular circumstances of each should be direct and certain.

Instruction number two should not have been given. A person may be guilty of violating the local option law who sells for himself or for another, or authorizes another to sell for him, but he is not guilty when the sale is made by another, though done in his presence, and at his solicitation, unless he be the owner of the liquor sold.

 Turnbull v. The Commonwealth.

It is not necessary to allege in an indictment that the person charged with violating the local option law in a town where it is in force had no license to sell; for by the terms of the law no license to sell in such town can be granted. The demurrer to the indictment was therefore properly overruled.

But for the errors mentioned, the judgment of the court below is reversed, and the cause remanded, with directions to set aside the verdict of the jury, grant the defendant a new trial, and for further proceedings consistent with this opinion.

 CASE 102—INDICTMENT—OCTOBER 6, 1881.

Turnbull v. The Commonwealth.

APPEAL FROM GRANT CIRCUIT COURT.

1. Upon the trial of an indictment against a married woman and another for malicious cutting and wounding her husband, he is not a competent witness against his wife.
2. Section 24, chapter 37, title "Evidence," applies to criminal as well as to civil cases.

W. MONTFORT FOR APPELLANT.

Section 24, page 414, General Statutes, provides that "neither husband nor wife shall be competent to testify for or against each other."
The statute applies alike to criminal as well as to civil cases.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

The alleged error of the court is not made one of the grounds for a new trial, and therefore this court will not consider it.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

Appellant, Sarah J. Turnbull, and William Brown, being jointly indicted and tried for the crime of willful and malicious cutting and wounding her husband, Melvin Turnbull,

75	495
90	500
79	495
122	500

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she was, by the verdict of the jury, found guilty, and her punishment affixed at confinement in the penitentiary for the term of one year, and judgment against her was accordingly rendered.

She has appealed from that judgment, and complains of an error of the court below in permitting her husband to testify as a witness upon the trial against her.

It is not necessary that the error of the court in admitting incompetent testimony be relied upon in a motion for new trial in order to enable the accused to avail herself of that error upon appeal. (Johnson v. Commonwealth, 9 Bush, 228.)

By section 24, chapter 37, title "Evidence," General Statutes, it is enacted "that neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while the relation subsists or afterwards," &c.

There is nothing to indicate that chapter 37 was intended by the legislature to apply exclusively to civil actions and proceedings; nor can section 24 by its terms be so confined in its application.

The court, therefore, in permitting her husband to testify against her, erred to the prejudice of appellant, and the judgment of conviction must be reversed, and the cause remanded, with directions to grant her a new trial, and for other proceedings consistent with this opinion.

Franklin, ex parte.

CASE 103—EQUITY—OCTOBER 8, 1881.

Franklin, ex parte.

79	497
88	463
79	497
92	157

APPEAL FROM MADISON CIRCUIT COURT.

1. Before a married woman can successfully demand the power to trade and do business as a *feme sole*, it must appear either that she has property, or a trade, calling, employment, or business, by which she can acquire property that calls for protection, under which she may enjoy the benefits of the one and the fruits of the other.
2. The statute was enacted not for the benefit of certain classes of married women, but for all alike.

C. F. & A. R. BURNAM FOR APPELLANT.

1. The word "may" used in the statute, is not infrequently equivalent to "shall." Sometimes it is permissive, sometimes directory. "It means shall when the public or individuals have a claim *de jure* that the power shall be exercised." (5 Johnson's Ch'y, 113; 5 Conn., 188; 22 Barb., 104; Story's Conflict of Laws, 17.)
2. When appellant made out her case, the court had no discretion, and should have granted the power. (Moran v. Moran, 12 Bush, 302.)

JNO. BENNETT AND R. MASON *contra*.

Appellant has set forth no material advantages that would accrue to her, nor any necessity for asking for power to trade as a *feme sole*. We rely upon the case of Moran v. Moran, 12 Bush, 301, as in point. The interest of the husband's creditors forbids that the power should be conferred.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Elizabeth Franklin and her husband filed a joint petition, praying the circuit court to empower her to use, enjoy, sell, and convey her property for her own benefit, make contracts, trade in her own name, sue and be sued as a single woman, and dispose of her property by deed or will.

It is alleged and proven that she owns 72 acres of land, willed to her by her grandfather, and twenty other acres which she purchased, and some personal property, and that her husband is insolvent. The witnesses state that she is

Franklin, ex parte.

well qualified to exercise the power which she seeks to have conferred upon her, and that they do not believe his creditors will be hindered or injured by the grant thereof.

The appellants' petition was dismissed, and they have appealed.

We do not think the case of *Moran v. Moran*, 12 Bush, 302, sustains the judgment. In that case the *insolvency* of the husband was the only ground upon which the application was made, and, in closing the opinion, the fact that the *feme* had no property, trade or calling, enabling her to earn money, was so emphasized as to indicate, had she possessed either, that would have been sufficient.

But it was not shown how the grant of such power could benefit or protect Mrs. Moran, and she was, therefore, properly denied the power which was idly sought, or might, if granted, have been perverted to the injury of her husband's creditors.

The purpose of the statute was to deny such applications, and avoid such results, and to provide a mode of protecting the property or acquisitions of the wife against the claim or debts of her husband.

But before she can successfully demand the power, it must appear that she either has property or a trade, calling, employment, or business by which she can acquire property that calls for the protection under which she may enjoy the benefits of the one and the fruits of the other.

The appellant has furnished satisfactory evidence of her ownership of the property named, and of her capacity to manage it; and there is no evidence whatever that the application is made upon the part of either to cheat, hinder, delay, or injure his creditors.

Anderson's trustee, &c., v. Sterritt, &c.

But it is suggested that to grant her the power will have that effect. How such a result can follow we are unable to comprehend, for no creditor of his can, either legally or equitably, reach her real estate or its rents, and appropriate them to the payment of his debts, unless the rents and profits of her lands were so increased by his labor or means as to exceed the necessities or comfort of the family; and in that case the excess which is traceable to his labor or means could be subjected to his debts after as well as before she is empowered to trade, &c., as an unmarried woman.

And we do not agree with the construction that the statute was enacted only for the benefit of certain classes of married women, and not for the wives of farmers. The law is applicable to all women alike.

Wherefore, the judgment is reversed, and cause remanded for judgment in conformity to this opinion.

70	499
80	384

CASE 104—EQUITY—OCTOBER 8, 1881.

Anderson's trustee, &c., v. Sterritt, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. An action to recover dower is not only a suit for the "recovery of real property," but for a freehold estate therein.
2. The suit is barred within fifteen years after the cause of action accrued.
3. The possession of the vendees is adverse to the widow of the vendor.

ALEX. P. HUMPHREY FOR APPELLANT.

The statute declares a bar of fifteen years. Appellee's cause of action accrued upon the death of her first husband, who conveyed the lots. (*Gossom v. Donaldson*, 18 B. Mon., 241; Gen. Stat., chap. 71, sec. 9, art. 3; 5 J. J. M., 15.)

Anderson's trustee, &c., v. Sterritt, &c.

BULLOCK & ANDERSON FOR J. H. HAMILTON.

This suit was commenced twenty-one years after the appellee's cause of action accrued. It is barred by the statute of fifteen years. A right to dower is a claim to a freehold in land. (6 Ala., 373; 3 Cranch Ct. Cl., 394; Shields v. Botts, 5 J. J. M., 13; Ralls v. Hughes, 1 Dana, 407.)

BYRON BACON FOR APPELLEE MERIWETHER.

1. Appellants rely upon the statute of limitations. The reply admits the conveyance by Lowe to the grantees, immediate and remote, of appellants, and it thus devolved upon appellees to rebut the presumption of appellants' possession arising from the conveyance made by the husband of appellee. (Chap. 24, sec. 23, Gen. Stat.; 8 Cranch, 175; Breckinridge v. Ormsby, 1 J. J. Mar., 244; 4 Bibb, 217.)
2. The words real property exclude dower. It is an estate for life in land. (Gen. Stat., chap. 21, sec. 13; 4 Bibb, 217.)

C. B. SEYMOUR, J. H. TRABUE, AND S. S. KOHN FOR APPELLEES.

1. The plea of fifteen years' adverse possession is not sustained by the proof.
2. Dower is only an encumbrance. (Fitzhugh v. Croghan, 2 J. J. Mar., 438.)
3. Limitation to an action to recover real estate begins to run when some one takes possession. (Jones v. Conley, 2 Duv., 15; Hughes v. Gregg, 4 Dana, 68; 18 B. Mon., 239.)
4. Possession to be adverse must be open and notorious. The ten years' statute cannot have any application to this case.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellee, Mrs. Sterritt, and her present husband, filed this petition, asking to have dower assigned her in certain lots of ground in the city of Louisville. Her former husband, Thomas Low, was seized in his own right of this land in his lifetime, and during the marriage, and conveyed the same by deed to Garvin, Bell & Co., the remote vendors of the appellants. Mrs. Low, now Mrs. Sterritt, was under age at the date of the conveyance by her husband; nor was the deed, although acknowledged by her, recorded within the time prescribed by law so as to pass her contingent right of

Anderson's trustee, &c., v. Sterritt, &c.

dower. She arrived at age in the year 1857, and became discover by the death of her husband in the year 1858.

The appellants relied as a defense on the statute of limitations, barring a recovery of real estate after the lapse of fifteen years from the accrual of the cause of action. The statute reads: "An action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims." The chancellor below adjudged that this statute did not apply, as the claim asserted for dower was not an action to recover real property, but the assertion of a mere right in the nature of a chose in action. The appellants then relied on the statute of ten years, that provides: "An action for relief not provided for in this or some other chapter, can only be commenced within ten years next after the cause of action accrued." It was considered below that this statute would apply if the appellants or those claiming under them had been in the actual adverse possession of the lots of ground for the period mentioned in the statute, but that the constructive possession following the legal title could not be regarded as adverse to the claim of the appellee.

A party may acquire title to real estate by adverse possession, but under either of the statutes relied on it is not necessary for the party holding the legal title, and against whom the claim is sought to be enforced, to show that he has had an actual possession under his claim of title for the period mentioned in the statute. It is true there must be an adversary claim to that of the plaintiff, for if not, there is nothing to prevent an entry on the land or the assignment of the dower. The appellants and their vendors have been claiming to hold this land under the conveyance made

Anderson's trustee, &c., v. Sterritt, &c.

to Garvin, Bell & Co. since the year 1856, and the appellee's disability was removed in the year 1858. She had then arrived at the age of twenty-one years, and was a *feme sole*. Her right to prosecute her claim, and to enter upon the land under the order of the chancellor, accrued at that time, and the statute expressly provides: "That an action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff. If there was no claimant of the property, and the possession was with the widow by reason of her marital rights, although not living on the property, an action would not be necessary; but here these parties were vested with the absolute title twenty-three or twenty-four years before the bringing of this action, and within the last five or six years made valuable improvements upon the property. Their claim was during all this time hostile to that of the widow, and her right to institute this character of action first accrued in the year 1858. If one is invested with the fee-simple title to land, the possession is necessarily with the title, unless there is an adverse holding, and no cause of action arises in favor of the owner until an entry is made under a claim of right, and then he may maintain his ejectment. The statute commences to run when the entry is made, and no right of action exists until then. If A owns vacant lands, and there is no hostile possession, he cannot sue to recover it, because there is no one to sue or wrong to complain of; but the moment there is an entry, with a claim of right hostile to the owner, the cause of action arises. This is the effect of the statute of limitations as between the real owner and one who acquires an actual adverse possession. This rule does not apply to the case at bar. The wife, at the time the appellants acquired the title,

Anderson's trustee, &c., v. Sterritt, &c.

had neither title, possession, or the right of entry, but a mere contingent right that she might enforce in the event she survived her husband. Her husband, who was invested with the legal title, and had either the constructive or actual possession, conveyed the absolute estate to the vendors of these appellants. They have held and claimed under that conveyance for twenty-three years or longer, and the widow is now asserting a claim hostile to this title, with a cause of action that originated more than twenty years before it was instituted. She is certainly barred from any recovery, not by reason of the ten years statute, but by reason of the fifteen years statute applicable to the recovery of real estate. It is true that at common law, and before the adoption of the Revised and General Statutes, there was no limitation to the assertion of a claim for dower; yet courts of equity fixed the period at twenty years, and denied a recovery after such a lapse of time. By our statute, "the words real estate or land shall be construed to mean lands, tenements, or hereditaments, and all rights thereto and interests therein, other than a chattel interest," &c. (General Statutes, chapter 21, section 13.) The claim to dower is not the assertion of a mere personal right or a chose in action; it is a right to real estate. (2 Scribner on Dower, page 33, section 21.) The widow claims that she is entitled to have assigned her one third in value of this real estate during her life. When assigned to her she has an estate of freehold, and it is difficult to arrive at any other conclusion than that the recovery, if successful, is of real estate, and not a mere chattel interest.

In the case of *Kinsolving v. Pierce*, reported in 18 B. Monroe, this court said a purchaser from the husband, by express contract, may purchase subject to the wife's claim

Anderson's trustee, &c., v. Sterritt, &c.

for dower, and that in such a case his holding would be presumed to be consistent with his purchase, &c. ; but where, as in the case then being decided, the purchaser denies the right, and claims and holds the land as his own, his possession is not only adverse to the vendor, but to all claiming under him. The *widow's right* of action accrues upon the death of her husband, and unless the possession be expressly held subject to her claim by the vendee, *her right of action will be barred by the statute of limitations*. This case shows that since the adoption of the Revised Statutes this court has regarded the statute of limitations as affecting the claim for dower like other actions for real estate, and it is manifest that, with the absolute title acquired from the husband, no actual possession is necessary to bar the wife's claim for dower. The purchaser from the husband held and acquired the same possession that the husband of appellee had, and for a wrongful entry on this land after the purchase these vendees could have maintained their ejectment ; and when the widow attempts to enter, or calls on the chancellor to disturb their title by assigning her dower, they may interpose the fifteen years statute, if that time has elapsed since the disability of the appellee was removed, for then her cause of action accrued.

The judgment below is reversed, and cause remanded, with directions for further proceedings consistent with this opinion.

Tabor, &c., v. McIntire, &c.

CASE 105—EQUITY—OCTOBER 8, 1881.

Tabor, &c., v. McIntire, &c.

79	505
108	709
109	710
79	505
108	709

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. Although a testator has no right to alter the laws of descent, he may designate and exclude from participation in his estate persons who would otherwise inherit.
2. The following paper, wholly written and signed by the testatrix, is held to be a valid will: "For sundry reasons and bad treatment, it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire, only through a responsible trustee, in the way of clothes and something to keep him from suffering."
3. The excluded heir being one of two children of a deceased sister of the testatrix, his brother is entitled to their mother's whole share to the exclusion of the brothers and sisters of the testatrix.
4. Thomas McIntire, a brother of the testatrix, is not entitled to a share absolutely, but a share should be invested for him by his trustee, so much of the interest to be used as may be required to furnish him annually with clothing, food, and shelter; and if the interest should not be sufficient for that purpose, the principal may be used as his annual necessities may demand.

REID & STONE FOR APPELLANTS.

1. The paper in controversy does not dispose of any property, and is therefore not a will. (Redfield on Wills, vol. 1, pp. 4 and 5; Jarman on Wills, vol. 1, p. 1; Bouvier's Law Dictionary, "Wills;" 4 Kent, 501; Byers v. Byers, 6 Dana, 313.)
2. A testator cannot disinherit his heir, unless he devises his estate to some one else. (Boisseau, &c., v. Aldridges, 5 Leigh (Va.) Reports, 222.)
3. The brother of the excluded heir takes their mother's share to the exclusion of the brothers and sisters of the testatrix.
4. The devise to Thomas McIntire does not invest him with the fee to any part of the estate, but only makes his support a charge on the estate.

O. S. TENNEY FOR APPELLANT RICHARD TABOR.

1. The paper in contest is a valid will. (Redfield on Wills, chap. 2, p. 4; Jarman on Wills, volume 1, page 1; Bouvier's Law Dictionary, "Wills.")
2. The appellant Richard Tabor is entitled to his mother's entire share.

W. H. WINN FOR MELVINA CONGLETON'S ADM'R.

The order admitting the paper in controversy to record as a will is conclusive until reversed or set aside by the circuit court. (Mitchell, &c., v. Holder, 8 Bush, 362.)

Tabor, &c., v. McIntire, &c.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

Malvina Congleton, having a brother and sister, and nephews and nieces of three deceased brothers and one deceased sister, but without children, died leaving a holographic will in the following language:

"For sundry reasons and bad treatment, it is my will and wish that Boone Tabor *shan't have* any of my property, and Thomas McIntire, only through a responsible trustee, in the way of clothes and something to keep him from suffering."

It was probated by the county court of Montgomery, and an administrator with the will annexed appointed.

He and the brother, sister and nephews and nieces filed a joint petition, making the two infant children of one of the nieces, who had died, defendants, and asking a construction of the paper.

The court adjudged that she died testate as to part, and intestate as to the remainder of her estate, and that the heirs and devisees take it as follows:

"First, Boone Tabor does not take or inherit any part of the estate of the deceased; second, Richard Tabor takes one eleventh part of the whole estate; third, Thomas McIntire takes two-elevenths of the whole estate, to be paid over to trustee, to be used by such trustee in such a way as to provide said Thomas McIntire with clothes, and to keep him from suffering."

To each of the stocks of those who were dead, and to the living sister, two-elevenths of the estate was adjudged.

From the judgment Boone and Richard Tabor appeal. They are the only children of one of the dead sisters.

For the appellant, Boone Tabor, it is insisted that the holograph quoted is not a will, because it simply changes the law of descent. While the testatrix had no right to

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alter the laws of descent, yet she had the right to dispose of her property as she wished, and might designate and exclude from participation in her estate persons who would otherwise inherit. The exercise of this right is the disposition of the share such excluded person would have received, and it results in giving it to another who she is presumed to have known would take it by descent. All she has done is to increase the interest in her estate of some of the inheritors, and destroyed and limited that of others. Had she given the whole of her estate to one, and excluded all the others, no doubt could have arisen in any mind that she had made a will recognized by the law; and as she excluded one, and limited another, and left her estate to be divided according to the law of descent among the others of her next of kin, there can be no doubt that the totally excluded nephew can take nothing under the laws of descent.

She declares that the dispositions contained in the holograph is her will and wish. And without indulging in a critical analysis of the facts of the authority cited, which show that the paper in that case was no will in truth, and not intended to be, so far as the omitted or objectionable persons were concerned, we are led to the conclusion that the paper wholly written and signed by Mrs. Congleton is a valid will.

But the court erred in not adjudging to the appellant, Richard Tabor, one-sixth instead of one-eleventh of the estate; for, as his only brother was excluded from participation in any part of the estate, and no one pointed out to take the share of their mother, Richard inherits the whole of her share, because in no event can brothers and sisters jointly inherit with children.

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Under the laws of descent the children, if any be living, take the estate of the deceased, and the brothers and sisters of the deceased never take by descent until it is shown that there are neither children nor their descendants, nor a father of the deceased living.

There can be no claim that the testatrix devised what Boone Tabor would otherwise have received by descent, but for his exclusion, to her brothers and sisters. She cut him off, and left her estate to be divided according to the laws of descent, except as to the appellee, Thomas McIntire, who does not take a vested right absolutely either to two-elevenths or one-sixth of the estate.

The language of the testatrix clearly indicates the purpose to reduce his portion below what he would have inherited from her.

She, in legal effect, says he shall not have any of her property except enough to clothe and keep him from suffering, and that she directs to be dispensed to him through a trustee.

This provision for him is a charge upon one-sixth of her estate, and as her will in regard to him may be carried out before one-sixth of her estate shall be consumed in the performance of the trust, it is evident he does not take a share absolutely.

The trustee should be put in possession of one-sixth of the estate, and he should, in view of the amount, and the habits of his *cestui que trust*, prudently invest it, and expend a sum, first using the interest, sufficient to furnish him annually with clothing, food, and shelter, and should the interest be insufficient, the whole of the principal, if necessary, may be taken, not invading it, however, except as his annual necessities demand it.

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Wherefore, the judgment is affirmed as to Boone Tabor, and reversed as to Richard Tabor, with directions to render judgment in conformity to the principles of this opinion.

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CASE 106—ORDINARY—OCTOBER 8, 1881.

Menderson, &c., v. Specker, &c.

APPEAL FROM BOURBON CIRCUIT COURT.

1. An attachment must be executed by the officer to whom it is directed, and cannot, like a summons, be executed by any officer to whom it might have been directed.
2. A garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand sought to be garnisheed; otherwise, no lien will be created.

ROSS & KENNEDY FOR APPELLANTS.

1. Subsection 3 of section 203 of the Civil Code does not require a notice to the garnishee specifying the debt or demand sought to be garnisheed.
2. An order of attachment can be served only by the officer to whom it is directed, and not by any officer to whom it might have been directed. (Civil Code, sec. 40; subsec. 1, sec. 47; sec. 199; subsecs. 1 and 2 of sec. 867; *Boaz v. Nail*, 2 Met., 246-7.)

BUCKLER & PATON FOR APPELLEES.

1. A constable may execute an order of attachment, although it be directed to the sheriff. (*Turner v. Howard*, 2 Duv., 112; *Long v. Gaines*, 4 Bush, 355.)
2. In order to create a lien, the garnishee must be served with a copy of the order of attachment, and with a notice specifying the debt or demand sought to be garnisheed. (Civil Code, subsec. 3, sec. 203; sec. 212.)
3. One attaching creditor can show that another creditor's attachment has not been properly executed. (*Peters v. Conway*, 4 Bush, 570.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellees, on the 17th of February, caused a general attachment against the property of Maddox to be issued and

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directed to the sheriff, which was on that day served upon Boyd as garnishee by *a constable*.

On the next day thereafter the appellants also sued out an attachment against Maddox's property, and had it directed to the *sheriff* or any *constable*.

It was served upon Boyd by a constable, who delivered to him *a copy* of the attachment.

Thereupon the appellees caused a second attachment to issue directed to the *sheriff*, who executed it upon Boyd by delivering to him a copy of the attachment, with a notice specifying the debt attached indorsed on the back of it.

Boyd paid the amount of the debt owing by him to Maddox into court, and it was adjudged that appellees had obtained priority, to the fund under their attachment, over the appellants who prosecute this appeal to reverse that judgment.

Any officer to whom the summons is or might have been directed may serve it according to section 47, Civil Code; but this is not the case with reference to the service of attachments, as there is no provision of the Code which authorizes *the service* of an attachment by any officer to whom it might have been directed, but to whom it is not in fact directed.

The absence of such a provision applicable to attachments, taken in connection with the fact that there is such a provision found in section 47 applicable to summonses, tends strongly to the conclusion that the legislature did not intend to authorize the *execution* of an attachment by any other officer than those to whom it is directed.

And this position is strengthened by subsection 2 of section 667, which expressly provides that an order for a provisional remedy may, at the request of the party in whose

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behalf it is issued, *be directed* to any of the officers named in the first subsection, who is not a party to, nor interested in, the action. The officers named in the first subsection are sheriff, coroner, jailer, and constable.

It must therefore follow that the service of appellees' first attachment by the *constable*, when it was alone *directed* to the sheriff, was illegal.

As appellees' second attachment, and appellants' only attachment, were each executed by the officer to whom it was *directed*, the question of priority must be determined by the *manner* in which the attachments were executed.

Subsection 3 of section 203, Civil Code, provides that an order of attachment shall be executed "upon other personal property (meaning such as is incapable of manual delivery) by delivering a copy of the order, with a notice specifying the property attached, to the person holding it, or *as to a debt or demand*, to the person owing it."

This subsection is intended to supply the holder of such property attached, or a debtor owing a debt or demand which is sought to be garnisheed, with notice of what property, debt, or demand is attached or garnisheed, and until such notice is served, it cannot be said that the attachment is legally executed.

And we are not inclined to enter into a discussion of the reasonableness of the statute as the law is thus written.

But in view of the certainty and protection to all parties interested, that must necessarily follow a literal compliance with the provision named, we can see no great hardship in enforcing its imperative requirements.

As the execution of appellees' second attachment was accompanied by the statutory notice, they were properly

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adjudged priority over the appellants, whose attachment was not executed in conformity to the subsection named.

Judgment affirmed.

CASE 107—EQUITY—OCTOBER 11, 1881.

Magruder v. Smith.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. A widow suing to recover dower in land alienated by her husband during his life-time is entitled to recover rents from the institution of her action.
2. She might, by amended petition, assert her claim to rents from the filing of her suit for dower.
3. If she dies, her personal representative may sue for and recover the value of her rents from the institution of her original action for dower.

J. F. BULLITT AND B. F. CAMP FOR APPELLANT.

1. The court erred in sustaining the demurrer to appellant's petition.
2. The appellant is entitled to recover rents from the 22d of December, 1867, to the time of his intestate's death.
3. If not that, she is entitled to recover rents from October, 1872, to the death of the intestate.

RODMAN & BROWN FOR APPELLEE.

1. The right to an action for rent does not exist, unless there is a final recovery of dower. (Washburn on Real Prop., 230-233; 6 Met., 538; 19 Maine, 146; 14 Ills., 242; Gill v. Golden, 16 B. Mon., 554.)
2. The case relied upon by appellant in 2 Dana, 421, has been overruled in Bondurant v. Apperson, 4 Met., 32; Jameson v. Mosby, 4 Mon., 414; Phillips v. Alcorn, 4 J. J. Mar., 38; Craig v. McBride, 9 Mon. 9; 1 Otto, 248; 23 Wallace, 410.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The husband of Mrs. Magruder, in his life-time and during the marriage, conveyed a tract of land of which he was then seized to one Fetter, and by subsequent conveyances the appellee Smith became the owner.

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The widow, shortly after the death of her husband, in December, 1867, brought this action against the appellee Smith, in the Louisville chancery court, asking that her dower be assigned her, but made no claim in that action for rent. The claim was resisted by the appellee, and in October, 1868, the chancellor made an interlocutory order in which she was adjudged entitled to dower, and appointing commissioners to allot it.

A report was made of the allotment shortly thereafter, but was never confirmed, and in 1876 Mrs. Magruder died, and her death terminated her right to dower.

The present appellant, having qualified as her administrator, instituted the present action, in which the facts herein stated were specifically alleged, as well as her right at the institution of the action to dower in the land, and sought to recover from the vendee in possession (the appellee), against whom the action was instituted, the value of the rents of her dower interest from the institution of the action in 1867 until her death in 1876.

The present action was instituted in November, 1877. The court below dismissed the petition, and the sole question presented here is, is the personal representative of the widow entitled to recover the rents?

Under the statute of 1796 the widow, after the recovery of dower, was entitled, as against the party convicted of withholding it, to damages, "that is to say, the value of the whole dower to them belonging from the time of the death of their husbands." This statute applies alone to land of which the husband died seized, and not to land sold and conveyed by the husband prior to his death. In such cause neither a court of law or equity could award dam-

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ages or afford the widow any relief for the detention of her dower. (Kendall v. Boney, 5 Monroe, page 282.)

The Revised and General Statutes have changed the common law rule as well as the statute of 1796 in regard to the claim of dower, and now the widow is entitled "to one third of the rents of her husband's dowerable real estate from his death until dower is assigned." (Sec chap. 51, sec. 8, General Statutes.) This section applies to land of which the husband died seized, or to his dowerable real estate. Section 9 of the same chapter provides: "Whether the recovery is against the heir or devisee, or purchaser from the husband, the wife shall be endowed according to the value of the estate when received by the heir, devisee, or purchaser, so as not to include in the estimated value any permanent improvements he has made on the land. Against the heir or devisee, or his alienee, *her claim for rent shall not exceed five years before action, and against the purchaser from the husband shall only be from commencement of action.* In either case it shall continue up to final recovery. *If, after action brought, the widow or tenant dies before recovery,* the rent may be recovered by her representative, and against his heirs, *devisees, and representatives.*"

The heir or devisee, or the alienee of either, who takes possession of the dowerable real estate at the death of the husband, are made liable for the rent five years prior to the institution of the action for dower. They are not entitled to the exclusive use as against the widow; but as to the purchaser from the husband during his life-time, he is not only in the possession rightfully, but is entitled to the exclusive use and possession until the death of the husband, and until the assertion by the wife, by action, of her claim for dower. Therefore, the distinction made as to the liability for rent,

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the heir, devisee, or alienee from them being liable for the rent for five years prior to the institution of the action for dower, and the purchaser from the husband for rent only from the time the action was instituted. The recovery alluded to is the recovery of her dower interest; for, as against the purchaser, she is not entitled to rent until she asks that dower be assigned, and this must be done by action so as to entitle her to rent. Such an action notifies the tenant or purchaser in possession of the character of her claim, and if he resists the recovery, he is liable for damages in the way of rent. It is not necessary there should be a recovery to entitle the widow to rent, but there must be an assertion of her right by action before she can recover it.

The statute expressly provides: "If, after action brought, the widow or tenant *dies before recovery, the rent may be recovered* by her representative, and against his heirs, devisees, and representative." This recovery is her dowerable interest, and the plain meaning of the statute is, that if she has instituted her action for dower, and dies before recovery, her representative may recover rent. This right is given from the fact that if an action is instituted to recover dower, and the right of recovery exists, all the incidents to the claim follow the action. It is not required by the statute that the claim for rent shall be embraced in the action for dower. The widow's right to rent arises from the demand by an action for the recovery of her dower, and although incidental to dower, the rent may be recovered in an independent proceeding.

As in ejectment after recovery, an action for mesne profits may be maintained by a separate suit, and under our system of pleading it may be embraced in the original action for the land, or by a separate action, so of rent—the widow

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may claim it in her original petition, or by an independent action, but must have sued to recover her dower before she is entitled to recover rent; and the fact of her death terminating her action for dower does not preclude her representative from recovering the rent, as the claim for rent in such a case passes, by reason of the statute, to him. (See *Burr, McGrew & Co. v. Woodson*, 1 Bush, 603.)

The widow could have filed an amended petition at any time asserting her claim for rent, or if she had prosecuted the action to final recovery she might have instituted an independent action in order to recover rent. If the right to recover rent was with the widow when she instituted her action for dower, this right has never been lost, and passed to her personal representative. The cases relied on by counsel for the appellee (some of them) are founded on statutes similar to the act of 1796, making the right of the widow to recover damages depend on the recovery of dower. The case of *Golden v. Hill*, reported in 16 B. M., seems to have been considered without reference to the Revised Statutes, as it is there adjudged that the widow is not entitled to recover rents against a purchaser, even from the beginning of her action. In the case of *Yancy v. Smith*, 2 Met., this court, in passing on the question under the Revised Statutes, adjudged that the widow is entitled to rents against the purchaser from her husband from the time she commences her action, and it is manifest that the case of *Golden v. Hill* was determined without the attention of the court having been called to the section of the Revised Statutes fixing the time at which the right to rent began. The sections in the Revised and General Statutes are almost identical, the word *suit* being used in the Revised Statutes where the word *action* is found in the General Statutes. Neither

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statute provides the manner in which the action for rent shall be brought, and it seems to us the principal question is, was the widow entitled to rent? If so, the right under the statute passed to her personal representative.

Her right to rent is unquestioned, and she has not waived that right by anything appearing in the record. The long pendency of the action is attributable, as is alleged in the reply, to the effort on the part of the parties litigant to compromise the claim, and this, if a shorter delay than the period of limitation could be regarded as an abandonment of the action, is a sufficient excuse for not prosecuting it with proper diligence. The right to dower in the widow being established, and she having instituted an action to recover it, the right to rent cannot be denied.

Judgment reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 108—EQUITY—OCTOBER 15, 1881.

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APPEAL FROM SHELBY CIRCUIT COURT.

1. A settlement made in good faith by the husband upon his wife, in the execution of an antenuptial contract, in writing, although void at law, will be sustained by the chancellor.
2. Marriage is a good consideration for such a contract and settlement, and if made in good faith, the settlement will not be disturbed at the instance of creditors.

L. A. WEAKLEY AND W. LINDSAY FOR APPELLANTS.

1. Marriage is a good consideration for the antenuptial contract in this case, and the settlement by the husband upon the wife being in good faith, ought to be sustained.
2. The pleading of appellees cannot be construed as charging fraud against the wife. (Thompson v. Heffner, 11 Bush, 353; Parsons on

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Contracts, vol. 1,431; 3 Cowen's Reports, 537; Johnson's Ch'y, 537; 11 Leigh, 136; 5 Allen, 348; 7 Peters, 389; Civil Code subsec. 4, sec. 113; Gen. Stat., chap. 44, art. 1, sec. 1; Beadles v. Miller, 9 Bush, 405; Maraman v. Maraman, 4 Met., 76; Bump on Fraudulent Conveyances 290; *Ib.*, 296; 17 Vesey, 264; Roper on Property, 303; 13 B. Mon., 496; 37 Iowa, 517; 5 B. Mon., 274; 4 Met., 59; 65 Maine, 279; 63 *Ib.*, 328; 115 Mass., 507.)

CALDWELL & HARWOOD FOR APPELLEES.

1. If such a contract as is alleged was made, it was a fraud upon creditors, and should be sustained.
2. The settlement is wholly disproportionate to husband's means, and is void for fraud.
3. It is clear that to the extent the husband used his wife's property and its proceeds in the settlement, it was fraudulent. It was personalty, and became his by the marriage. (Kerr on Fraud and Mistake, 202; Simpson v. Graves, Riley's Ch'y, 232.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

This case involves the validity of a settlement made in pursuance of a written antenuptial contract executed by the appellants on the 8th of February, 1878, in this language:

"An article of agreement entered into between J. B. Sanders of the first part, and Orra A. Davis of the second part. The said James B. Sanders agrees to give Orra A. Davis (provided she marries him) as good a house, to have and to hold forever, as her sister, Helen M. Stout had, or a sum of money equivalent to the same, *five thousand dollars.*"

Not long after this writing was made they intermarried.

At that time he owned a farm, and one horse and buggy, and was indebted in the sum of about \$750 as principal, and near five thousand dollars as surety; and she owned 42 acres of land, worth \$1,000, a horse, and had "\$600 loaned out."

He sold his land on the 15th of July, 1878, for the sum of \$8,556.55; but before doing so, he obtained his wife's relinquishment of her contingent right of dower by executing and delivering to her a paper reciting the substance and

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purpose of the antenuptial contract, and agreeing to pay to her five thousand dollars so soon as he should collect "the money" for which he sold his farm.

This paper would be of little weight in the absence of the antenuptial contract, because of the ease and security with which it might have been fabricated; but in view of all the facts of this case it is freed from suspicion, and based upon a valuable consideration.

She was not bound or compellable to relinquish her dower right, and would doubtless have refused to do so had her husband declined to give her a written assurance of his good faith and purpose to execute the marriage settlement which he had agreed to make upon her as a part of the marriage contract, but had not done.

Her relinquishment was a valuable consideration (Hall v. Plummer, 6 Indiana, 121), and that fact should be given its full weight in view of the antenuptial agreement.

While contracts made between husband and wife, as a general rule are void, still if a husband voluntarily enter into a contract to make, or he does make, a settlement upon his wife in discharge of an obligation arising out of the reception of her property under an agreement made before its receipt or reduction to possession, such as the chancellor would, on her application, make upon her, neither the contract nor the settlement would be regarded as fraudulent against creditors. And with much greater reason it can be said that such a contract is possessed of vital force when preceded by a *bona fide* antenuptial contract and supported by a valuable consideration (relinquishment of dower), moving from her to him at the instant of its execution. (Latimer v. Glenn, 2 Bush; Campbell v. Campbell's trustee, MS. Op., 1881; Miller v. Edwards, 7

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Bush, 397; Lyne, &c., v. Bank of Kentucky, 5 J. J. Mar., 550.)

But passing from the meritorious character of the second writing, and adverting to the antenuptial contract, we find upon both law and fact ample authority in its support.

The case of Magniac and others v. Thompson, 7 Peters, 393, cited by appellants' counsel, contains the doctrine of the text-books and decided cases in this country and England upon the issue involved in this case. We cite the following extract from it with hearty approval, as stating with perspicuity the rule and its reasons:

"Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud.

"If the settler alone intended a fraud, and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it.

"Marriage in contemplation of law is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and, from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration."

As that case grew out of a marriage settlement actually made before marriage, and in the case before us the settlement was not consummated until *after* marriage, it is not in that particular a complete authority here. But in the case of Browning's administrators v. Coppage, 3 Bibb, this court held that a contract between husband and wife, made before

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marriage, but not to be operative until after coverture ceased, was not extinguished by the intermarriage, under the rule that, in general, the contracts made between husband and wife when single became void by their marriage.

And this exception to the general rule is based upon the valuable consideration furnished by her to uphold the contract. And in that case the consideration was her agreement that he should enjoy all of her estate during his life, although she might die without issue. On this point see 2 Bibb, 408.

And in a more recent case, *Kinnaird, &c., v. Daniel, &c.*, 13 B. Mon., 500, valuable and meritorious considerations moving from the wife were given their full force in support of settlements made after marriage in pursuance of an antenuptial agreement.

Roper on Property, volume 1, page 303, cited in the case above, says that—

"Settlements made after, but in pursuance of, written articles entered into or letters written before the marriage," are "unimpeachable by any persons, whether they be creditors or subsequent purchasers, for the contract of marriage is a valuable consideration, and establishes the settlement against every one."

Having mentioned the law upon antenuptial contracts to make settlements executed both before and after the marriage, for the purpose of giving each of the writings executed by Sanders to his wife its due force, and to point with certainty to the issue of fact in this case, we find that an action was brought by each of the appellees, after procuring a return of no property, upon executions which emanated from judgments at law rendered in their behalf against the appellant husband for debts that he had created as surety,

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in which they substantially allege that he had fraudulently caused a deed to be made to his wife to a tract of land he had purchased subsequent to the sale of the land owned by him at the time of the marriage, for the purpose of cheating and delaying his creditors, and that she participated in his fraudulent intent.

The answer of the appellants denies the material allegations of fraud, and they rely on a settlement upon the wife made in execution of the antenuptial contract.

Was the settlement fraudulent in fact?

It appears that out of the sum for which he sold his land he paid to her, in part performance of the marriage contract, \$3,955 and disposed of the residue of the \$8,556.55 by paying \$3,000 of it to his creditors, and retaining or consuming the balance in support of himself and wife.

On the 31st of December, 1878, he, as her agent, bought the land sought to be subjected by appellees to their debts, and had it deeded to her. The price agreed to be paid for the land was \$4,459.90, all of which she paid with the money obtained from him, and a portion of her property that she owned when they married.

Her deed was duly acknowledged and recorded, and before appellees instituted this action to set aside the conveyance, she had expended the remainder of her property and money, and a part of \$1,500 she had borrowed in erecting houses and other improvements upon what she had the right to suppose was her own land.

At the time the marriage agreement and deed to her were executed, the evidence tends strongly to prove that she knew nothing of the amount or character of his indebtedness, except the information given to her by him, to the effect that he owed a small amount for his sons and sons-

in-law, which he did not expect to have to pay, and about \$750 for debts created by himself.

The evidence, if to be believed, and it is not impeached or attempted to be discredited in any way except by their condition and the character of the transaction, and we see nothing in the first to justify such a violent inference, and the last is upheld by sound policy and a highly meritorious and very valuable consideration, shows that she stands as fair as any other purchaser for value. And it never has been held that the mere fact that an assignment, sale of property, or payment of money in discharge of an obligation to a *bona fide* purchaser or creditor, operates as a preference of one creditor over another, is sufficient at common law to invalidate it, unless it be for a consideration so inadequate as to prove the perpetration of an actual fraud upon creditors, which is participated in by both or all the parties to the transaction.

It is true if one were guilty of fraud, in so far as it could be reached without injury to another who was innocent, it would be the duty of the court to render relief; but as we have seen, in a case like this, the wife must also participate in or have knowledge of its perpetration.

She maintains her innocence by her sworn evidence, and having invested nearly all she possessed in the land for which she relinquished her dower in a much more valuable tract, and performed with fidelity the antenuptial contract, we are unwilling to disturb her in the enjoyment of a home prepared by her industry, and lawfully anticipated by her marriage agreement.

Wherefore, the judgment is reversed, and cause remanded for judgment in conformity to this opinion.

Fitzpatrick, &c., v. Todd, &c.

CASE 109—ORDINARY—OCTOBER 15, 1881.

Fitzpatrick, &c., v. Todd, &c.

APPEAL FROM FLOYD CIRCUIT COURT.

1. The obligation of a supersedeas bond executed by a personal representative must be treated as binding him and his surety to pay the damages and costs of the appeal, and the judgment in case of affirmance, out of the assets which have or may come to his hands in the course of his administration.
2. Such a bond cannot bind him personally.

A. DUVALL AND ROBT. WEDDINGTON FOR APPELLANTS.

1. The court erred in overruling the demurrer to the petition.
2. If this bond makes appellant personally responsible, no fiduciary can prosecute an appeal with supersedeas without making himself bound personally for the entire matter in controversy, with damages and costs.
3. But such have not been the rulings of this court. (Green's adm'r v. Gill, Sneed's Rep., 271; Mahan v. Tydings, 10 B. Mon., 351; Nelson v. Tyler, 11 B. Mon., 140.)

HAMPTON & HAGAR FOR APPELLEES.

1. The petition sets forth the bond, its breach, and damages.
2. It was not necessary that execution should have issued before instituting suit on the bond.
3. The record shows no error in the circuit court.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellant, W. H. Fitzpatrick, as executor of Burwell Vaughn, jr., deceased, appealed from a judgment against himself, in his fiduciary capacity, to the Court of Appeals, and executed a supersedeas bond with his co-appellant as surety.

The style of the case at the head of the bond describes the principal as "executor of the estate of Burwell Vaughn, jr., deceased, appellant."

He is mentioned in the body of the bond as "appellant," and "Wm. H. Fitzpatrick, appellant," and the covenants

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are, that the "appellant" will pay all costs, damages, &c., and satisfy and perform the judgment in case of affirmance.

He signed the bond with these words, "Exe'r of B. Vaughn, dec'd," attached to his name.

The original judgment, from which he prosecuted the appeal, directed the amount of it to be levied of assets, and the executions thereon and for the ten per cent. damages awarded on the affirmance, which was had, were issued against him as executor, to be levied of assets.

The appellees brought their suit upon the supersedeas bond named against the appellants, alleging non-payment of the judgment and damages, but failing to aver that the executor had in his hands assets of his intestate's estate in any amount at the time the supersedeas bond was executed, or that any assets had since come to his hands, and that he had wasted them, or that he had neglected to perform his duty in appropriating the assets of the estate to the payment of debts, or in collecting assets for that purpose, or that any assets existed. In short, no breach is assigned except non-payment.

The appellants moved to dismiss the suit for want of an affidavit and demand of the executor, and the court properly overruled the motion.

No answer being filed, on the call of the cause the petition was taken for confessed, but during the same term an affidavit excusing the failure to answer, accompanied by an answer, were offered to be filed. The court rejected them, and rendered judgment against appellants individually.

They have appealed.

In the case of Mahan, &c., v. Tydings, &c., 10 B. Mon., this court held that an injunction bond "should be adapted to the nature of the case, and bind the executor and his

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surety, in case the injunction should be found wrongful and be dissolved, &c., to pay the judgment, &c., out of assets in the due course of administration, to the extent that the same might be properly applied thereto. . . . Such a bond binding the executor and his surety personally, so far as the debt enjoined is concerned, for the due administration of the assets from the date of the bond, and securing the creditor from loss by subsequent maladministration to his prejudice, is all the security can justly demand from the law which authorizes the suspension of his remedy, and is all . . . that the statute . . . intended to require or authorize."

The doctrine of that case was recognized in *Nelson v. Tyler*, 11 B. M., 141, in which it was held, that although the obligation to pay the penalty of an appeal bond was personal on the obligors, who were an administrator and his surety, they were not individually bound beyond the assets in the hands of the administrator, except for costs, which the act of 1812 authorized; but now, by section 17, chapter 26, General Statutes, the personal representative in any action is exempted from judgment for costs, except against the assets which have or may come to his hands.

The bond sued on, in reciting the appellants' obligation, literally follows the language of section 748, Civil Code, specifying the terms of a supersedeas bond; but does it follow that this obligation is to be discharged by personal representatives individually? If so, no personal representative could rid himself of an erroneous judgment to be alone levied of assets, without the risk of personal responsibility, as the penalty of failure to succeed upon an appeal.

No such obstruction or danger should attend the honest effort of a personal representative to relieve the estate from

 Sansberry v. Simms' adm'x.

a judgment that a reasonable man, acting under such advice as personal representatives are entitled to, would consider erroneous and unjust to the estate which he represents; and the obligation of a supersedeas bond, when executed by a personal representative, must be treated as binding him to pay the damages and costs of the appeal, and the judgment in case of affirmance, out of the assets which have or may come to his hands in the due course of administration.

This construction of the bond is reasonable, because it does not suspend the rights of the appellees upon the original judgment to any greater extent than the bond fully secures; nor against any property which the bond thus construed does not preserve to them.

Wherefore, the judgment is reversed, and cause remanded for further proceedings not inconsistent with the principles of this opinion.

 CASE 110—EQUITY—OCTOBER 18, 1881.

Sansberry v. Simms' adm'x.

APPEAL FROM WASHINGTON CIRCUIT COURT.

1. The law gives to a widow a homestead for her use as long as she occupies it by herself, her tenant, or agent, without reference to the kind or value of other property she may have in her own right, or the source whence she derived it, and she cannot be divested of it, except by her own act.
2. The property given to her by her husband before his death cannot be estimated in fixing the value of her homestead.
3. It was error for the court to adjudge that she was entitled to one thousand dollars absolutely out of the sale of her husband's land. Her estate in it is for life only.

R. J. BROWNE AND J. W. S. CLEMENTS FOR APPELLANT.

1. Appellee lost her right to a homestead by abandoning the premises before it was allotted to her.

79	527
109	128
79	527
112	767
79	527
126	697

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2. She resided in a house of her own after her husband's death. The law does not give the widow her homestead. This home of her own should at least be estimated in allotting the homestead. (Sec. 14, art. 13, chap. 38, Gen. Stat.; Gasaway v. Woods, 9 Bush, 72; Mason v. Rogers, 4 Littell, 377; Phillips v. Pope, 10 B. Mon., 172.)

JNO. W. LEWIS FOR APPELLEE.

1. Appellee did not leave the property for any other purpose than to rent it.
2. It is immaterial how she became entitled to her other real estate. The statute is peremptory that she shall have out of her husband's estate, after his death, a homestead of the value of one thousand dollars. (Phipps v. Acton, 12 Bush, 377; sec. 14, art. 13, chap. 38, Gen. Stat.; *Ib.*, sec. 9; *Ib.*, sec. 12; Eustache v. Rodiquet, 11 Bush, 46; Gasaway v. Woods, 9 Bush, 72; Hansford v. Holdman, 14 *Ib.*, 412; 38 Texas, 410; 79 Ills., 455; Thompson on Homesteads and Exemptions, secs. 266, 271, 274; 53 Ills., 346; 18 Am. Law Reg., 457; Ky. Law Rep., July, 1880, 62; *Ib.*, Sept., 200.)

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

In September, 1878, J. R. Simms died intestate and without children, but left a widow, and a brother, sister, and infant children of a deceased sister his heirs at law.

January 31st, 1879, the widow brought this action, making the heirs at law defendants. In her petition she claimed a homestead exemption in a house and lot, and dower in another lot; and alleging the property was not susceptible of division, asked for judgment directing the sale of both lots, and the payment to her the value of the homestead in money arising from the sale, and the residue to those entitled to it.

The court adjudged she was entitled to a homestead exemption in the property of the value of one thousand dollars, and ordered the sale, and the payment of that sum to her out of the proceeds, and the balance to the heirs. No order was made for allotment of dower to the widow, nor is she entitled to it, having claimed her homestead exemption, which exceeds it in value.

Sansberry v. Simms' adm'r.

From that judgment the defendants have appealed, and the errors assigned by them will be considered in their order.

1st. They contend the court erred in adjudging she was entitled to a homestead exemption, because having, after the death of her husband, ceased to occupy the premises, she forfeited her right to it.

She admits that, about five weeks after her husband died, she did leave the homestead and remove to a house conveyed to her by him previous to his death, but denies the removal was permanent, and it is not shown it was. She states that the duration of her occupancy of the house to which she removed was intended to be only until she could sell it, which she desired to do. It appears that she leased the homestead, and took notes for the rent payable to herself, and that, except a few weeks when she was absent on account of ill health, it was continually occupied by herself or tenants.

Construing section 14, article 13, chapter 38, General Statutes, this court, in the case of Phipps v. Acton, 12 Bush, 377, not essentially different from this, used the following language:

“But we are of opinion that the widow's temporary absence from the premises, after having rented them out, and placed her tenant in possession thereof, is not such an abandonment as will forfeit her claim to the homestead under the statute: for she may be said to be in possession by her tenant, and so long as she is in the occupancy or control of the premises by herself, her agent, or tenant, her right to the homestead will continue.”

We consider that case decisive of the question of appellee's right to a homestead exemption in the property.

Sansberry v. Simms' adm'r.

2d. It is contended that her husband having, before his death, provided her a house and lot in which to reside, and to which she removed after his death, the object of the law was complied with, and she ought not to have a homestead in the property owned by him when he died.

The record does not show either the consideration or purpose of the conveyance to her by her husband, nor is there any evidence she accepted the property so conveyed in lieu of her homestead exemption. It must therefore be regarded like any other property she may have owned, as being no obstacle to her claim of homestead exemption. The law gives to the widow the homestead for her use as long as she occupies it by herself, her tenant, or agent, without reference to the kind or value of other property she may have in her own right, or the source whence she derived it; and she cannot be divested of her homestead right except by her own act. Nor should the property given to her by her husband before he died be estimated in fixing the value of her homestead exemption.

It is true this court, in the case of *Miles v. Hall*, 12 Bush, 109, where the widow owned an undivided interest in her own right in the homestead itself, held that such interest should be estimated as part of the exemption. But here the property owned by appellee is disconnected, and constitutes no part of the homestead.

If a part of the widow's own real property may be estimated in fixing the value of the homestead exemption, all, or enough, if she have it, to equal the entire amount, may be; thus, in many cases, depriving them of what the law in express terms gives them.

3d. It is contended that though she may be entitled to the homestead while occupied by her, appellee is not entitled

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to any part of the money for which it was sold, or to the use of it.

It is true the homestead is only for the use of the widow so long as she occupies it, and no express provision is made for the sale of it for her benefit. And, on the other hand, if it is not divisible, however valuable, the law makes no provision for the sale of it, except subject to her right of occupancy, even for the payment of debts against the estate of her deceased husband. If, therefore, the strict letter of the law is adhered to, cases of extreme hardship to creditors and heirs, as well as to the widow, may arise, requiring relief by courts of equity. But as justice may be done here without violating the letter or spirit of the law, it is not necessary to inquire how far a court of equity might go in such cases.

No objection was made by appellants in the court below to a sale of the property, nor do they ask a reversal of the judgment on that ground. Having consented to a judgment for the sale, which the court had no authority to render without, appellants cannot be heard in this court to object to the payment to appellee the value of her homestead exemption out of the money arising from the sale.

4th. But the court below erred in adjudging she was entitled to one thousand dollars absolutely. She is not entitled to a homestead exemption of the value of one thousand dollars, but to such exemption in land, including the dwelling-house and appurtenances, not exceeding in value that sum. And she did not acquire by the sale a greater interest or estate in the money for which it was sold than she had in the land.

The court should have provided in the judgment either for the safe investment of one thousand dollars for her use

Graves v. McGuire, Helm & Co.

and benefit during life, or paid it over to her, requiring bond with good security for the return of it to the heirs at her death, or given to her absolutely what her life estate in that amount is worth, rated by the American annuity and life tables, taking into consideration her age, health, and probable duration of life, as she might elect.

For that error, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

CASE 111—ORDINARY—OCTOBER 20, 1881.

Graves v. McGuire, Helm & Co.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. A promise made by a debtor after he has filed his petition in bankruptcy, and before his discharge, to pay an antecedent debt, cannot be enforced.
2. It is only a naked promise to pay a debt already existing.
3. The acceptance of the promise by the creditor adds nothing to its significance.

S. W. RAILEY FOR APPELLANT.

1. The court erred in refusing to instruct the jury as asked by appellant in instructions 1, 2, 3, and 4.
2. It erred in giving instructions 1, 2, and 3.
3. The promise of appellant to pay a debt to appellees, in existence when the former had filed his petition in bankruptcy, and before his discharge, is void. (Ogden v. Redd, 13 Bush, 582.)

W. O. & J. S. DODD FOR APPELLEES.

1. Appellees accepted the promise of appellant to pay the debt, and thereby lost their right of action against him upon the original debt. They made no proof of their debt in the bankrupt court, relying exclusively upon his new promise.
2. Such a promise is binding. (Ogden v. Redd, 13 Bush, 582; Kingston v. Wharton, 2 S. & R., 213; 2 Cowper, 544; Rev. Stat. U. S., sec. 5105, 5106, and 5112.)

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JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

There is no distinction in the case before us and that of *Ogden v. Redd*, reported in 13 Bush. The appellant in this case, after filing his petition, and before he obtained his discharge in bankruptcy, promised to pay the debt due the appellees.

After his discharge, the appellant, by reason of certain transactions between himself and the appellees, asserted a claim for a balance due him on settlement.

Appellees admit the balance, but say that they have applied it to the debt the appellant owed them prior to his discharge in bankruptcy, alleging that the appellant, after filing his petition, promised to pay the debt; that this promise was accepted by them in lieu of the original undertaking, and relying upon it, they did not file their claim before the assignee in bankruptcy. They pleaded the same as a set-off, and obtained judgment over for \$464. An issue was properly formed, and the jury returned into court special findings to the effect—

1. That plaintiff did promise in March, 1878, to pay the defendants the balance he owed them.
2. That the defendants accepted said promise.
3. That plaintiff had notice or knowledge of such acceptance.

On these findings the judgment was rendered for the defendants. The inquiry at once arises, in what manner did these appellees accept the promise made, and how did the appellant have notice of this acceptance?

The testimony of one of the appellees is, that he accepted the proposition or promise in his own mind, but at no time communicated that fact to the appellant, and the only evidence the jury had as to the knowledge of the appellant in

Graves v. McGuire, Helm & Co.

regard to this acceptance of the new promise was the promise itself, and if such knowledge had even been established, we are of the opinion that it did not create a new obligation.

It is nothing more than a promise to pay a debt already owing and collectable by law, and a renewed assurance to the creditor, without any additional consideration, that the debt will be paid. The original undertaking remained in full force, and had never been discharged, and as long as the creditor can maintain an action on the original promise, a new promise, without some additional consideration, will not support an action.

This is the rule laid down in *Ogden v. Redd*, as well as by all the elementary authorities.

Suppose the appellees had sued the appellant on the original undertaking, and the latter, instead of relying on his discharge in bankruptcy, had pleaded, by way of accord and satisfaction, that he had, subsequently to the original promise, say on the — day of March, 1878, made an additional promise to pay the debt, and it was accepted by the defendants, and therefore the last promise, and not the original undertaking, created the liability, can it be successfully maintained that such a plea would be good? We think not.

There must be some distinct agreement, based upon a consideration in which the original contract is merged or discharged, before such a promise can be made available, except for the purpose of defeating a plea of limitation. Where the debt is barred by time or by the bankrupt's discharge, and is no longer collectable by law, a new promise, based on the moral obligation to pay, creates a liability; but so long as the original contract can be enforced, a mere promise or acceptance of the liability will not support the action.

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In the case of *Ogden v. Redd* it is stated: "It is not alleged or claimed that the promise on the latter was accepted in satisfaction of the note, and consequently it did not discharge the appellee from the obligation created by it." This counsel seem to have relied on in the court below; but when following the opinion, and in the next sentence, it is said, "that the new promise, without an additional consideration, will not support an action, otherwise the debtor would be exposed to two actions."

In the case of *Trueman v. Fenton* the question was, whether a bankrupt may not, in consideration of a debt due before bankruptcy, and after a commission in bankruptcy sued out, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor in whole or in part satisfaction for the debt by a new undertaking.

In that case the creditor gave up the securities he had for his debt, and accepted the note of the bankrupt for a little more than half the amount due in full satisfaction of his whole demand. The creditor waived his right to present his claim in bankruptcy, and in fact had delivered to the debtor the evidences of his demand, and had no claim to present except the debtor's note for one half the amount originally due him. That was a fraud on the creditor; but here there was only a promise to pay, nothing more, and this has never been held to create a new obligation or to work an estoppel so as to prevent the bankrupt from relying on his discharge as a bar to the recovery.

There was no agreement to forbear, and it will not do to say that the mere forbearance to present the claim before the assignee in bankruptcy gives vitality to the promise, and

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creates an obligation upon which the action can be maintained. .

The mere assurance in the mind of the creditor that he will accept or forbear to act with reference to his claim, will not amount to a contract with his debtor. He must forbear to present his claim by reason of some contract, made by both parties, based upon a consideration, or been so defrauded by the debtor as to estop the latter from relying on his defense in bankruptcy. A mere promise to pay is not sufficient. A new promise to pay a debt already existing cannot be made the foundation of an action. (Gilmore v. Green, 4 Bush.)

In *Stethen v. Sherman*, 1 Sanford Superior Court, 510, it is said: "Although it is alleged that the new promise was made after the bankrupt's petition, it does not aver that it was made after his discharge. If before the discharge, it cannot be set forth as an independent cause of action."

The letter written to the appellees prior to the discharge in bankruptcy sheds no light on the question here. Appellant wanted the appellees to make advances to enable him to pay what he owed them, and this they declined to do.

The appellees were not entitled to the judgment.

The judgment is reversed, and cause remanded, for further proceedings not inconsistent with this opinion.

Brightwell v. The Commonwealth, &c.

CASE 112—EQUITY—OCTOBER 27, 1881.

Brightwell v. The Commonwealth, &c.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. After the father of a bastard child has claimed the benefit of the insolvent debtor's oath, and an execution has been issued against him from the county court, and returned *nulla bona*, the circuit court has jurisdiction to enforce the collection of the judgment.
2. The remedy for enforcing the judgment of the county court is not found alone in the statute in regard to bastardy. The chancellor has the power beyond the statute to compel the payment of the judgment.

A. J. JAMES FOR APPELLANT.

1. The circuit court has no jurisdiction of the original demand of Tyree, the mother of the bastard children. (Smith v. Bohon, 12 Bush, 449; 10 *Ib.*, 251.)
2. Even if there had been a judgment of the circuit court, a second suit for the enforcement thereof could not be maintained without a *bona fide* return of "no property found."
3. If this suit can be maintained, there is no end of litigation.
4. Two things are necessary to give the circuit court jurisdiction: a *bona fide* return of *nulla bona* and a petition seeking discovery. (Civil Code, 439; Weathersford v. Myers, 2 Duv., 91; 12 Bush, 449; Helm v. Short, 7 Bush; Mitchell v. Hurd, 11 Bush.)

JNO. & J. W. RODMAN FOR APPELLEES.

1. The circuit court had jurisdiction to enforce the collection of the judgment rendered by the county court after a return of *nulla bona*. (Thompson v. Buchanan, 2 J. J. Mar., 417; Hamilton v. The Commonwealth, 3 Mon., 213; Craig v. Burnett, 9 Bush, 98; Jones v. Jeffries, 11 Bush, 636.)
2. This is not a penal action. (4 Mon., 511; 4 Met., 67; 1 B. Mon., 206; 3 Bush, 6.)
3. The tenant for life must give security. (Hill on Trustees, 390; 1 McM. Eq., 459; 17 S. & R., 293; 5 Watts, 108; 7 *Ib.*, 19; 6 Iredell's Eq., 379.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The appellant, William Brightwell, by a proceeding under the statute in relation to bastardy, was adjudged to be the father of two infant children, and required to pay their

Brightwell v. The Commonwealth, &c.

mother a certain annual sum for each child during a fixed period. The appellant, failing to pay the money or to execute a bond as required by the statute for its payment, was lodged in jail, and afterwards released from custody upon taking the insolvent debtor's oath.

Subsequent to this an execution issued on the judgment in favor of the mother, and was placed in the hands of the sheriff of Franklin county, and by him returned *no property found*.

In January, 1878, the mother, in her own right and for the use of her infant children, filed this petition in equity in the Franklin circuit court against William Brightwell and others, in which it is alleged that the appellant (Brightwell) had conveyed all of his property to his wife to avoid the payment of this debt; that the wife was dead, and her administrator had in his hands moneys that of right belonged to the appellant sufficient to pay the debt.

The conveyance sought to be set aside passed to the wife the title to certain land described in the petition that belonged to the husband.

The appellant denied the fraud, and pleaded the proceedings in the county court on the charge of bastardy in bar of appellees' action, claiming that the county court alone had jurisdiction to enforce the judgment. There was money enough in the hands of Mrs. Brightwell's administrator to pay the debt, and by virtue of the judgment the amount was paid over, and the judgment satisfied.

It seems to us the only question in the case is as to the jurisdiction of the circuit court. The insolvent debtor's oath, independent of the return of no property found on the execution issued from the county court, gave to the chancellor jurisdiction unless the remedy is exclusively with

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the county court. If the remedy is confined to the execution on the judgment to be issued from the county court or a rule against the party in default, it would result that the appellee has no means of enforcing the judgment in this case, although the appellant is the owner of an estate ample to satisfy the demand. We do not understand that the remedy for enforcing such a judgment is to be found alone in the statute under which the proceeding was had.

Other remedies must necessarily attach when that afforded by the statute is incomplete, and not restricted by its express provisions.

The county court had no jurisdiction to pass upon the question of title to the land sought to be subjected, and with such a jurisdiction belonging alone to the chancellor, there is no reason why the appellee should not be permitted to invoke its exercise. Bonds executed by the father of the bastard child for its support have been enforced in the circuit courts of the state. The right to make the debt out of the estate of the appellant is not questioned, and as there is no remedy provided by the statute under which the proceedings were had so as to enable the creditor to reach the property covered up by the fraudulent act of the debtor, the remedy must be sought in that tribunal authorized to apply it where it has jurisdiction of the amount in controversy. (See *Thompson v. Buchanan*, 2 J. J. Marshall; *Hamilton v. Commonwealth*, 3 Monroe.)

During the progress of this case, the children of Brightwell were before the court, and claimed an interest in remainder in the moneys held by the administrator of their mother, alleging that the appellant was entitled to the use for life only.

Tate, Treasurer, &c., v. Salmon, &c.

The extent of the interest of the appellant in the property had been previously determined by this court in another proceeding, and the remaining question in the case is, did the chancellor err in requiring of the appellant bond with surety for the forthcoming of the principal sum at the termination of his life estate?

The record of the former proceedings with reference to this property shows the appellant to be a man of rather intemperate habits, and hostile to his children, whether with or without cause it is not necessary to inquire; and under the circumstances the chancellor acted properly in protecting the interest of those in remainder.

There is no error in the record prejudicial to the rights of appellant.

Judgment affirmed.

CASE 113—EQUITY—NOVEMBER 8, 1881.

Tate, Treasurer, &c., v. Salmon, &c.

79	540
1105	850

APPEAL FROM DAVIESS CIRCUIT COURT.

1. The commonwealth cannot be sued in her own courts without special legislative authority, and parties will not be allowed to evade this rule by ignoring the commonwealth in their suits, and proceeding directly against the public officer having the custody of the fund sought to be reached.
2. The act of the general assembly, requiring of the Piedmont and Arlington Insurance Company a deposit of \$10,000 for the benefit of its policy-holders in this state, failing to make any provision for the disposal of the fund, the State Treasurer cannot dispose of it or be compelled to do so by order of any court until there be further legislative authority.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLANTS.

Neither the state nor her officers as such can be sued without an act of the legislature authorizing it. (Rolle, ass'e, v. Andes Ins. Co., 23

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Gratt., 509; Divine v. Harvie, 7 Mon., 439; Tracy & Loyd v. Hornbuckle and wife, 8 Bush, 336; Rodman v. Musselman, 12 Bush, 354; 30 Grattan, 72.)

OWEN & ELLIS FOR APPELLEES.

1. This being the first suit brought for a distribution of the fund in controversy, the court in which it was brought acquired jurisdiction over the fund, and may distribute it. (Secs. 72 and 210, Civil Code.)
2. The state is not a party to this action and has no interest in it; therefore an act of the legislature authorizing the suit was not necessary.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

By section 47 of an act of the general assembly, entitled "An act to establish an Insurance Bureau," approved March 10, 1870, it is provided as follows: "When, by the laws of any other state, any taxes, fines, penalties, deposits of money or of securities, or other obligations, prohibitions, or requirements are imposed upon insurance companies organized or incorporated under any general or special law of this state, and transacting business in such other state, or upon the agents of such insurance company greater than those imposed upon similar companies by the laws of this state, or when such laws of other states shall require insurance companies of this commonwealth to deposit money or security for the benefit or protection of citizens of such other states, or when the laws of any other state, or the officers thereof, shall prohibit companies of this commonwealth from transacting business in said state without a special examination of said companies, or a computation of their liabilities by the officers of said state, the same taxes, fines, penalties, deposits, examinations, obligations, and requirements shall be imposed upon all insurance companies doing business in this state which are incorporated or organized under the laws of such state, and upon their agents."

Tate, Treasurer, &c., v. Salmon. &c.

It appears that the legislature of the state of Virginia passed a law requiring every life insurance company organized or incorporated under laws of other states, before doing business in that state, to deposit with the treasurer thereof securities of the cash value of at least ten thousand dollars. It therefore became the duty of the Insurance Commissioner of this state, under section 47 just quoted, to require the Piedmont and Arlington Life Insurance Company, a corporation created by law of Virginia, to deposit like securities with the Treasurer of this state before, and as a condition of, doing business here; and accordingly such deposit was made.

This action was brought in the Daviess circuit court by appellee Salmons against James W. Tate, Treasurer of this state, and others, for the purpose of compelling him to deliver that fund to the commissioner and receiver of that court, to be paid and distributed, under orders of the court, to the holders of policies of insurance issued by the Piedmont and Arlington Company.

It is alleged in the petition that appellee and others hold such policies of insurance, and have duly paid the premiums thereon; that the company has violated its contract of insurance made with the policy-holders, forfeited its right to receive further premiums, and has become insolvent, and made an assignment of its property, which is in the hands of the receiver of a Virginia court.

The demurrer to the petition filed by Tate, Treasurer, having been overruled, and the court having by an order required him to deliver the fund in his custody to the receiver of the court, he has appealed.

Tate, Treasurer, &c., v. Salmon, &c.

The only question necessary to decide is, whether this action can be maintained against the Treasurer of the state at all.

By section 6, article 8, of the constitution, it is provided, that "the general assembly may direct, by law, in what manner and in what courts suits may be brought against the commonwealth." But the general assembly has not seen proper to enact a general law authorizing such suits to be brought, or conferred upon any court of the state jurisdiction to control and distribute the fund in the custody of the Treasurer.

It has been repeatedly decided by this court that, in the absence of a law authorizing it, the state cannot be made a party-defendant or garnishee, and is not suable in her own courts; "that parties will not be allowed to evade this inhibition by ignoring the state in their suits, and proceeding directly against the public officer having the custody of the moneys sought to be reached." (*Divine v. Harvie*, 7 Mon., 440; *Tracy v. Hornbuckle*, 8 Bush, 336; *Rodman v. Muselman*, 12 Bush, 336.)

As no law has been passed by the general assembly for the disposal of the fund, it must remain in the custody of the Treasurer of the state subject to such use or appropriation as may hereafter be provided by law, and no suit to recover or dispose of the fund can be maintained until the general assembly shall direct in what manner and in what court it may be brought.

Wherefore, the judgment of the court below in overruling the demurrer to the petition, and directing appellant to pay the fund over to the receiver of that court, is reversed, and the cause remanded, with directions to dismiss the petition of appellee.

Campbell v. Golden, &c.

CASE 114—EQUITY—NOVEMBER 8, 1881.

Campbell v. Golden, &c.

APPEAL FROM KNOX CIRCUIT COURT.

1. The guardian should not be charged with interest upon interest in biennial rests, as no balance was owing by him at the end of any year after his appointment.
2. The principal of the funds of the ward, or such part as is necessary, may be used by the guardian when the ward is of such tender years or infirm health that he cannot be apprenticed, or no suitable person will take him as such for nurture and education.

W. O. BRADLEY, JOHN G. EVE, AND CAMPBELL FOR APPELLANT.

1. The guardian has the right under the statute to use such part of the principal of the funds of his ward as is necessary for her comfort and maintenance.
2. He ought not to have been charged with interest upon interest. (Rev. Stat., vol. 1, 578; 1 M. & B. Stat., 765; 4 B. Mon., 320; Hughes v. Smith, 2 Dana, 251; Gen. Stat., 506.)

DESHMAN & McCLARY AND JOHN & J. W. RODMAN FOR APPELLEES.

It is the duty of the guardian to raise the ward upon the interest of the fund in his hands. If that be not sufficient, it is his duty to bind the ward as an apprentice. The statute imposes this duty upon him. (Bybee v. Tharp and wife, 4 B. Mon., 320; Campbell v. Williams, 3 Mon., 124; 4 J. J. Mar., 389; Civil Code, 608; 7 Mon., 171; 2 J. J. Mar., 404; Irvin v. McDowell, 4 Dana, 631; Rev. Stat., vol. 1, 578; Howell v. Vanmeter, 5 Dana, 554; 2 Bush, 286; Greenleaf on Ev., vol. 1, sec. 148.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

When Celia Gibson was but eighteen months old her mother died, leaving her homeless, and without a protector.

The appellant was immediately appointed and qualified as her guardian.

He at once took custody of his ward, and collected the sum of \$328.27, which she was entitled to by distribution

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from her grandfather's estate; and was all the estate she owned.

It appears that Celia was subject to the diseases incident to childhood, and at times exceedingly cross and fretful, which made it necessary for appellant to hunt new homes for her, as the neighbor women whom he had employed to clothe, feed, and care for her became weary of their charge.

A Mrs. Pope kept her longest at \$25 per year.

When she became old enough to attend school he sent her to all the common and subscription schools taught in the neighborhood; boarded, clothed, and treated her well at his own house from the time she was twelve years old until her elopement and marriage with her co-appellee in the year 1871, which was in her seventeenth year.

During the whole period of her wardship he made advancements to defray the expenses of her maintenance and education as her necessities demanded.

His daughter was about the same age of Celia, and their treatment was so alike no difference was discovered by any of the witnesses.

On several occasions he evinced deep solicitude for her welfare by riding on horseback twenty miles to see her.

In the incipency of his duties he loaned \$300 of her money at ten per cent. interest per annum, and annually collected the interest until the year 1870.

The interest was insufficient to maintain her, and hence he made the needed advancements.

He was subjected to considerable expense and trouble in an abortive effort to collect the principal of the fund he had loaned, by reason of the non-residence of one of the borrowers and the insolvency of the other, but was refused by

the judgment any credit for expenses or services incurred on that account.

As he had caused the money to yield ten per cent. per annum, and subjected himself to personal responsibility for the loss of the principal by contracting for a usurious rate of interest with a non-resident, the court should have allowed him the reasonable expenses and value of his personal services, not more, however, than the excess of interest beyond the legal rate.

He was allowed \$39 for his services devoted to her personal safety, sustenance, education, and social elevation from the cradle to the marriage altar, whither her husband, now dissatisfied with appellant's conduct as guardian, carried her against the latter's consent.

This allowance was not reasonable under the circumstances of this case, and there is no law which arbitrarily confines the allowance to the sum of five per cent. on disbursements where the services of the guardian are rendered not only in managing and disbursing the money of his ward, but by personal care and custody of the ward whose nurture and education have been confided to him.

Section 11, article 2, chapter 48, General Statutes, provides, that "the guardian, besides all necessary disbursements and repairs, shall be allowed by the court a reasonable compensation for his services."

In the light of the evidence, \$100 is barely reasonable compensation for his services. The court ought to have allowed him that sum.

While boarding with appellant she rendered some services which were an advantage to her by reason of their light character and the training in household duties that their performance gave to her; but she should be allowed their

Campbell v. Golden, &c.

value, which, according to the evidence, could not have exceeded one half the value of her board. The appellant should have been credited with her board and charged with her services at the rate stated.

He was charged with ten, but only allowed six per cent. interest on the expenditures, board, advancements, &c., made by him.

There was no reason for charging the guardian with interest upon interest in biennial rests, as no balance was owing by him at the end of any year after his appointment which he had not loaned out.

None of her money remained in his hands for as much as one year, as it must have taken, according to the evidence, the \$28.27 not loaned out by him to clothe and care for Celia the first year of his appointment.

He should have been credited with the sums he was entitled to as of the date of payment or from the time of the rendition of services, and interest charged to him at ten per cent. on the remainder after the deduction of credits. (Sec. 10, art. 2, Gen. Stat.)

It is insisted that the principal of her patrimony, although it is personal estate, cannot be applied to the payment of advancements made by the appellant in furnishing her food, raiment, shelter, and education suitable to her condition.

It is true that the first clause of section nine, article two, chapter forty-eight, of the General Statutes, forbids the allowance of any disbursement to the guardian for maintenance and education beyond the income of the estate, but the second exception thereto embraced in the same section authorizes the judicious and proper application of the principal of the ward's personal estate to his board and tuition when it is best for the ward to so use it.

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And so the principal of the personalty may be used when the ward is of such tender years or infirm health that he cannot be apprenticed, or no suitable person will take him as an apprentice.

To this may be added that the 11th section named above directs an allowance to the guardian for all necessary disbursements.

These provisions are intended to embrace such a case as we conceive this one to be, and to protect from want or ignorance wards with small personal estates.

The expenditures and advancements by the appellant were judiciously and properly made for necessities, board, and education of his ward, whom he fitted for the sphere in which she moves. And if it should become necessary, upon a settlement of his accounts, according to the principles herein indicated, to apply the whole of the principal of her estate in his hands to reimburse him, he is entitled by law to have it done.

It was held in the case of *Janet v. Andrews, &c.*, 7 Bush, 314, that "where necessary to the proper maintenance and education of the ward, or for the payment of debts," the chancellor would direct the sale of an infant's *real* estate or reimburse the guardian by the sale of real estate for advancements which the chancellor would have authorized had he been applied to before they were made.

And it is plain the statutes are more stringent against the sales of real estate to reimburse guardians for advancements than they are against the appropriation of personalty for such a purpose.

This distinction was put in the statute because of the difference in the nature of personal and real estate.

Wilson, &c., v. Ewing, &c.

Wherefore, the judgment is reversed, and cause remanded, with directions to render judgment in conformity to the principles of this opinion.

CASE 115—EQUITY—NOVEMBER 10, 1881.

Wilson, &c., v. Ewing, &c.

APPEAL FROM BATH CIRCUIT COURT.

1. A widow is entitled to one third of the rents and profits of her husband's dowable real estate from his death until dower is assigned, notwithstanding the existence of a vendor's lien.
2. The lien of a vendor is upon the land alone, and does not extend to the rents and profits.

R. GUDGELL & SON FOR APPELLANTS.

The existence of the vendor's lien did not affect the widow's right to one third of the rents and profits of her deceased husband's real estate prior to the assignment of dower. (Gen. Stat., sec. 8, art. 5, chap. 52.)

V. B. YOUNG AND J. S. HURT FOR APPELLEES.

The widow is entitled to one third of the rents and profits of only so much of the land as remains after satisfying the vendor's lien. (4 Bush, 147.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

R. W. Mark having died the owner in fee-simple of a tract of land on which he owed a part of the purchase-money, suit was instituted to enforce the lien therefor, and to sell the land to pay his general creditors, his personal estate being insufficient for that purpose.

Pending these proceedings, the land was rented for the years 1873 and 1875 by the court's commissioner and receiver, and the widow of Mark occupied and received the rent for the year 1874.

79	549
107	538

79	549
124	454

Wilson, &c., v. Ewing, &c.

It took thirty-three acres of the land to pay the vendor's lien, and the court assigned dower to the widow in the remaining thirty-eight acres, one rood, and twenty-nine poles, and adjudged that she was entitled to one third of the rents produced by the last named quantity from her husband's death until she was assigned dower in it, but decreed the distribution between appellees, who are creditors of decedent, of the whole of the rents accruing from the thirty-three acres after his death, and before it was sold to pay the purchase-money, or her dower was assigned.

From that judgment she has appealed.

The amount of rent collected by her was one third of the total rents issuing out of said land for the three years named, and she should not have been required to pay any of it to her husband's creditors, as it was the exact amount she was entitled to by law out of said rents.

Section 8 of article 4, chapter 52, General Statutes, provides, that—

“The wife shall be entitled to one third of the rents and profits of her husband's dowable real estate from his death until dower is assigned.”

It is true this court held, in the case of *Harrison v. Griffith, &c.*, 4 Bush, 147, that a widow is not entitled to dower as against a vendor's lien for purchase-money, but the question of her right to rent before the enforcement of the lien was not presented or decided in that case, and it is not authority on the question involved here. The lien for the purchase-money was upon *the land*, and not upon the rents and profits, as was held by this court in the case of *Collins, &c., v. Richart, &c.*, 14 Bush, where a lien of this character was considered.

Wilson, &c., v. Ewing, &c.

As the rents could not be subjected to the payment of the lien, we cannot see how the existence of the lien affects the right of the widow to the rents of her husband's dowable real estate from his death to the assignment of dower to her.

The lien for the purchase-money did not destroy, but was superior to, her right of dower.

Had the lien been paid off, no question of her right to dower in the whole tract could have been raised, and the mere existence of the lien, which does not increase, diminish, or embrace the rents, cannot deprive her of the right to one third thereof, which the statute provides she shall be entitled to for the period these were collected and accrued.

No right of substitution by appellees to the rents exists through the lien-holder, as he has no more right to the rents than any general creditor of the husband, and therefore the rents should be disposed of as if the lien had never existed.

If the land was dowable real estate, her right to one third of all the rents named is unquestionable, and section 2 of the same article quoted settles this question in her favor by declaring that she shall be endowed of the real estate of which he was seized of an estate in fee-simple at any time during the coverture.

He was seized of the land during coverture, and the tenure of his estate therein was in fee-simple, and the land was therefore dowable real estate in the sense those terms are used in section eight above quoted.

Wherefore, the judgment is reversed, and cause remanded for judgment consistent with this opinion.

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CASE 116—ORDINARY—NOVEMBER 17, 1881.

2r	558
85	187

79	552
114	938

79	552
113	606
125	663

Twin Creek and Colemansville Turnpike Road Company v. Lancaster. Same v. Renneckar.

APPEALS FROM HARRISON CIRCUIT COURT.

1. Where several persons jointly undertake to subscribe to the capital stock of a company to be organized for the prosecution of a common enterprise, which has for its object the advancement of the private interests of the several subscribers, the promise by each is a good consideration for the promise of the others, and it is too late, after the act of incorporation takes place, to withdraw from the association, whether the work has or not been undertaken.
2. As the subscribers agreed in this case that their subscriptions should be subject to a call of ten per cent. as soon as the company should be organized, the undertaking was not a mere agreement to subscribe, but was in fact a subscription subject to no other condition than the organization of the company, and as soon as that was completed and the call made, it was the duty of the subscribers to pay.

W. T. LAFFERTY AND T. T. FORMAN FOR APPELLANT.

1. Where several promise to contribute to a common object desired by all, the promise by each may be a good consideration for the promise of the others. (Parsons on Contracts, vol. 1, p. 452, 6th ed.; Watkins, Tr., v. Eames, 9 Cushing (Mass.), 539.)
2. The fact that the company was not organized at the time the subscription was made does not invalidate it. (Lackey v. Richmond and Lancaster Turnpike Road Co., 17 B. M., 48; Thompson v. Page, 1 Met. (Mass.), 570.)
3. Advances having been made and liabilities incurred on the faith of appellee's subscription, appellant is entitled to recover. (1 Parsons on Contracts, p. 453, 6th ed.; Homer v. Dana, 12 Mass., 190; Thompson v. Page, 1 Met. (Mass.), 570; Mt. Sterling Coal Road Company v. Little, 14 Bush, 429.)

A. H. WARD FOR APPELLANT.

The doctrine laid down in the case of Goff v. Winchester College does not apply here, as the contract sued on in that case was in many respects different from the one sued on in this case. (Gill's adm'r v. Kentucky Gold and Silver Mining Co., 7 Bush, 638; Fry's ex'r v. Big Sandy Railroad Company, 2 Met., 314; 25 Ills., 393; 21 Penn., 220.)

Twin Creek and Colemansville Turnpike Road Co. v. Lancaster.

W. H. RATLIFF FOR APPELLEES.

As there was no incorporated company at the time the subscription sued on was made, it is not an enforceable contract. (Green's Brice's *Ultra Vires*, p. 475 and note; Angell & Ames on Corporations, p. 271; Goff v. Winchester College, 6 Bush, 443; Phillips' Limerick Academy v. Davis, 11 Mass. Reports, p. 112; Essex Turnpike Co. v. Collins, 8 Mass., 297; New Bedford and Bridgewater Turnpike Co., 8 Mass., 141; Mt. Sterling Coal Road Company v. Little, 14 Bush, 429.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

These appeals are prosecuted from a judgment of the Harrison circuit court, in which a demurrer was sustained to the petition of the appellant, and the actions dismissed.

J. A. Lafferty, John W. Martin, and others, including the two appellees, J. H. Renneckar and Reuben Lancaster, were desirous of constructing a turnpike road in the county of Harrison, between certain designated points, and with a view of creating an incorporated company under chapter 56 of the General Statutes, so as to begin the enterprise, entered into the following agreement, or made what is alleged to have been a subscription, as follows :

"We, the undersigned, for the purpose of constructing a turnpike road from ——— to ———," designating the beginning and terminus of the road, "promise and agree to subscribe the amounts set opposite our respective names to the capital stock of a company to be organized for that purpose, and to pay the same in such installments as may be called for by the proper officers of such company, and we further agree that our said subscriptions may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized. Given under our hands," &c. Signed by J. A. Lafferty and eleven others, the names of the two appellees being among the number.

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The parties, or some of them, to this subscription organized a company, with the corporate name of the Twin Creek and Colemansville Turnpike Road Company, for the purpose of constructing the turnpike road mentioned in the subscription.

/ The appellees were named as corporators, together with
/ the others whose names appear on the subscription; but whether they authorized their signatures to the articles of association filed for record in the office of the county court clerk does not appear.

After the statute had been complied with and the company organized, a call was made on the appellees for a part of their subscription, and refusing to pay, this action was instituted in the name of the corporation, and on the agreement to subscribe to recover the amount of the call made.

An answer was filed to the petition, to which there was a demurrer, and that pleading reaching back, the demurrer was sustained to the petition. An amendment was then filed, and a demurrer sustained to the petition as amended, and a judgment rendered for the defendants.

The organization of the company is alleged in the original petition; the promise to pay by reason of the subscription made prior to the act of incorporation; the demand made of the appellees under a call properly made and their refusal to pay, &c. In the amendment it is alleged that the articles of incorporation were entered into in pursuance of the subscription made prior to the incorporation of the company, and that the corporators and others signing the subscription did so relying upon the defendants' promise to pay their subscriptions; that its road is in process of construction, with contracts made for that purpose, and the subscription of the appellees is necessary to its completion.

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The statements of the petition as amended constituted a cause of action. The association, made by virtue of a provision of the General Statutes, is nothing more than a private corporation, and although the improvement contemplated is for the public good, the road, or rather the profits from its use, inure to the benefit of the stockholders, and the contract or subscription entered into prior to the organization of the company creates such an obligation as renders the appellees liable for their subscription.

The purpose of signing this subscription was to enable the subscribers to organize and form a corporation that would inure to the benefit of all. It was in fact a mutual agreement, by which each subscriber pledged himself to the other to pay a certain sum of money in order to perfect the organization and complete the enterprise.

"A subscriber or partner in an intended undertaking, subscribing an agreement to take measures to carry out the same, cannot discharge himself from liability, or repudiate the concern to which he may have pledged himself." (Angell & Ames on Corporations, sec. 523.)

This was not in fact an agreement to subscribe, but it was a subscription without any other condition than the organization of the company or corporation: "we further agree that our said subscriptions may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized."

There was no other condition annexed, and when the articles of incorporation were completed, the company organized, and a call made in pursuance of the agreement and charter, it was the duty of the subscribers to pay the call. The right to collect was contingent only on obtaining the act of incorporation, and when this was done, the agreement

Twin Creek and Colemansville Turnpike Road Co. v. Lancaster.

to pay was no longer conditional, but absolute. (Thompson v. Page, 1 Met. (Mass.), 570.)

“Where several promise to contribute to a common object desired by all, the promise by each may be a good consideration for the promise of the others.” (Parsons on Contracts, vol. 2, page 452.)

The agreement in this case is not a mere voluntary donation by the appellees, but an agreement in effect to form an association which, when organized and the enterprise completed, will vest the parties with a right of property that will advance their private as well as the public interests; and in such a case we regard the doctrine as well settled, that it is too late, after the act of incorporation takes place, whether the work has or not been undertaken, to withdraw from the association.

Cases may be found sustaining the position assumed by counsel for the appellees in this case, denying the right of recovery in the case of voluntary donation upon the ground that the promise made by one of the donees is the consideration for the promise made by the others.

In the case of Watkins, Treasurer, v. Ames, 9 Cushing, it is said: “Opinion has fluctuated upon the question, how far, in a common subscription by several persons to an object of public utility, the promise of each one is the consideration for that of another. It has been objected, that to assume the respective promises as a consideration one for the other, is begging the whole question, &c. But if it clearly appear that a number of subscribers promise to contribute money, on the faith of the common engagement, for the accomplishment of an object of interest to all, and which cannot be accomplished save by their common performance, then it

Twin Creek and Colemansville Turnpike Road Co. v. Lancaster.

would seem that their mutual promises constitute reciprocal obligations."

This court, in the case of *Lackey v. a turnpike company*, reported in 17 B. Monroe, held a subscription valid made payable to the president and directors prior to the act of incorporation, and adjudged that the agreement could be enforced as soon as the obligee came into existence.

The contract in this case, it is true, is made with the individual subscribers, and not with the corporation; but the article containing the terms of the subscription binds the subscriber to pay the corporation when created, and this was the inducement among the subscribers to convert themselves into an association for the prosecution of the particular enterprise.

The money due is for the corporation, and the promise is to pay the corporation, and the consideration is the mutual agreement between these parties to form the corporation and build the road; and when the corporation was created the appellees were bound by their subscription.

The case of *Goff v. Winchester College*, 6 Bush, is relied on as authority for the action of the court below. A careful examination of that case will show that the recovery was denied for the reason that the appellees had failed to comply with the conditions annexed to the subscription made by the appellant. It is said in the opinion that it is essential to the validity of a contract that it be mutual, and parties to it, and further, that appellant did not mutually agree with others to pay the sums named. This does not militate against the principle recognized in this case; and besides, the case under consideration is not that of a mere gift of appellees' money to a public charity, but is an agreement to embark in a com-

Cason v. Cason.

mon enterprise for the private interests of the parties who are connected with the corporation.

For the reasons indicated, the judgment sustaining the demurrer to the petition as amended is reversed, and as the appellees must answer the petition as amended, it is proper to add that the answer as filed presents no defense to the action. The conditions attempted to be annexed to the subscription, if omitted by mistake, or by reason of fraud, would be properly pleaded, but in its present form the answer is defective.

79	558
96	114
79	558
97	221

CASE 117—EQUITY—NOVEMBER 17, 1881.

Cason v. Cason.

APPEAL FROM HARRISON CHANCERY COURT.

A plaintiff, by joining issue upon a counter-claim of the defendant, waives all right to object to that pleading, because the caption does not contain the words "answer and counter-claim," as required by subsection 4, section 97, Civil Code. That section applies where the plaintiff has failed to reply.

C. W. WEST FOR APPELLANT.

1. The defendant was not entitled to judgment on his counter-claim, as the caption of his answer did not contain the words "answer and counter-claim."
2. It was error to allow the defendant to file the amended answer.
3. The proof did not authorize the recovery.

L. M. MARTIN FOR APPELLEE.

1. The proof authorized the recovery.
2. It was proper to allow the amended answer to be filed to conform the pleadings to the proof.

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

Subsection 4 of section 97, chapter 4, of the Civil Code, provides, that "a defendant shall not have judgment upon

Cason v. Cason.

a set-off or counter-claim, unless the caption of the answer contain the words answer and set-off, or the words answer and counter-claim; but a misdescription in the caption of the nature of the defendant's claim shall not prevent him from having judgment; nor shall a plaintiff have judgment upon a counter-claim, unless the caption of his reply contain the words reply and counter-claim."

The object of this provision is to apprise the adverse party that a claim is set up either in the nature of a set-off or counter-claim, upon which a judgment is sought, and to prevent him from being misled by denominating the pleading an answer only. In the present case the counter-claim is styled *answer of defendant*.

This answer asks a judgment over, and contains all the averments necessary to make it a counter-claim, and the appellant (plaintiff below) replied to the counter-claim, and on that pleading an issue was formed.

The appellant could not have been misled in such a state of case, and he waived all right to object to the pleading after issue joined. No motion was made in the court below to require the character of the pleading to be given in the caption; but appellant responded to the counter-claim, and on the trial a judgment was rendered against him.

If there had been no reply to the answer, and a judgment had gone by default for the counter-claim, then the provision of the Code would apply, as the caption had the effect of inducing the plaintiff to believe that no judgment over was sought. We think the proof authorized the recovery.

The judgment below is affirmed.

Commonwealth v. Bruce.

CASE 118—INDICTMENT—NOVEMBER 17, 1881.

Commonwealth v. Bruce.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

1. In cases of house-breaking, which are analogous to burglaries at common law, whether the place of ingress was a part of the house charged to have been broken into, is a question of law for the court, and not a question of fact for the jury.
2. Where there is internal communication between the apartment broken into and the room or building which the accused is charged to have feloniously entered, the offense is complete so far as the act of breaking and entering is concerned.
3. Although a judgment of acquittal in a felony case cannot be reversed, it may be reviewed on the appeal of the commonwealth for the purpose of securing a uniform and correct administration of justice.

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLANT.

The removal of the iron grating was a sufficient breaking to constitute burglary. (2 Wharton on Criminal Law, sec. 1544.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a verdict and judgment of acquittal on an indictment for house-breaking, the penalty for which is confinement in the penitentiary from one to five years.

The first question is as to the power of this court to review the rulings of the lower court upon judgment of acquittal in felony cases. It was held in *Commonwealth v. Cain*, 14 Bush, and we now hold, that such judgments may be reviewed on the appeal of the commonwealth for the purpose of securing a uniform and correct administration of justice, although the judgment cannot be reversed. This we think is the proper construction to be given to sections 335, 337, and 339 of the Criminal Code.

The specification in the indictment is to the effect that appellee broke and entered into a certain store-house with the felonious intent to steal therefrom. The evidence

Commonwealth v. Bruce.

showed that the accused entered the cellar under the store-room by removing a grate on the street which gave entrance to the cellar. The evidence further showed that there was a communication through a hatch-way to the store, and that the cellar was used to store goods.

The court instructed the jury, that if they believed, from the evidence, that the grating removed by the accused was not a part of the store-house, they should acquit. The only question is as to the correctness of that instruction.

Whether the place of ingress in such cases, which are analogous to burglaries at common law, is a part of the house charged to have been broken into, is a question of law for the court, and not a question of fact proper to be submitted to the finding of a jury; and, therefore, if, as a matter of law, the grating removed was a part of the store-house, it was the duty of the court to tell the jury that such entry was a breaking within the meaning of the statute.

As a general rule, where there is internal communication between the room or apartment broken into and the room or building into which the accused is charged to have feloniously entered, such entry completes the offense denounced by the statute, so far as the act of breaking and entering is concerned. (Bishop on Statutory Crimes, sec. 282.) In this case there was such internal communication, and the facts of the case are within the rule stated.

The judgment of the lower court must stand, but the clerk will certify this opinion as containing the law of the case.

Griffith v. Cox, &c.

CASE 119—EQUITY—NOVEMBER 29, 1881.

Griffith v. Cox, &c.

APPEAL FROM MASON CIRCUIT COURT.

1. It is not necessary that a creditor should have judgment and return of "no property" in order to enable him to maintain an action to have a conveyance declared to have been made in contemplation of insolvency.
2. The statute does not authorize the appointment of a receiver in such an action, except to take charge of such property as may be under the control of the person to whom the sale, mortgage, or assignment shall have been made, unless the property is in danger of being lost, removed, or materially injured; so where a mortgage does not pass the possession and control of the property mortgaged, the court has no power to compel its surrender to a receiver before it is decided that the mortgage was made in contemplation of insolvency.
3. So long as a debtor remains solvent, no sale, mortgage, or assignment by him can be held to have been made in contemplation of insolvency, unless actual fraud be alleged and proved.

A. E. RICHARDS FOR APPELLANT.

1. An action to set aside a conveyance as fraudulent does not accrue until the creditor has obtained a judgment and return of "*nulla bona*." (Moffatt v. Ingham, 7 Dana, 495; Hulbert v. Grant, 4 Mon., 581; Page v. Boyce, 6 J. J. M., 83; Haskell v. Wynne, Ky. Law Rep., July, 1881; Evans v. Reay, *Ib.*, Sept., 1881; Napper v. Yeager, *Ib.*, July, 1881.)
2. The record fails to show that the mortgage was made in contemplation of insolvency.
3. The court had no jurisdiction to sell the land before it had adjudged the mortgage to have been made in contemplation of insolvency, and the judgment of sale was therefore void.
4. A final judgment need not be excepted to in order to maintain an appeal. (Barton v. Campbell, 2 Dana, 422; Story v. Hawkins, 8 Dana, 12; Maysville and L. R. R. Co. v. Punnett, 15 B. M., 48; Dawson v. Litsey, 10 Bush, 411; Coffman v. Wilson, 2 Met., 543.)

WHITAKER & ROBERTSON FOR APPELLANT.

No brief with record.

W. H. WADSWORTH FOR APPELLEES.

No brief with record.

Griffith v. Cox, &c.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellant and her brother owned a tract of land and personal property worth between \$14,000 and \$15,000.

They mortgaged the land to Riley for about \$2,000, part of which was a preëxistent debt.

The appellees brought suit to have the mortgage declared to operate as an assignment and transfer of all the property of the appellant and her brother, for the benefit of all their creditors, on the ground that it was made in contemplation of insolvency, and with the design to prefer Riley to the exclusion of appellees and other creditors.

Before ascertaining or deciding whether the mortgage was so made, the court appointed a receiver to take charge of and sell the personal estate, decreed a sale of the land, and appointed a commissioner to make the sale.

The whole of the personalty was sold by the receiver, and the real estate by the commissioner. The reports of sale were confirmed, and immediate possession of the land was ordered to be given to the purchaser.

After these things were done, the cause was referred to the master commissioner to audit debts and ascertain the amount the mortgagors owed, and also the value of their property.

The commissioner's first report showed that the appellant owned more property than she owed debts, either as principal or surety, and the cause was again referred to him to find out if there were any more debts; but a second report exhibited the same result.

Yet, notwithstanding she was thus affirmatively shown to have been solvent when she executed the mortgage, and that she had continued solvent, even under the enforced surrender and sale of her property, the chancellor adjudged that the mortgage was made by her in contemplation of

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insolvency, and directed a distribution of her estate amongst her creditors.

This judgment was supplemented by an order requiring the appellant to pay the sum of three hundred dollars to the appellees' attorneys for their services rendered in behalf of their clients.

From these judgments she appeals.

It is insisted for appellant, that before the appellees had the legal right to bring their suit to have the mortgage declared to be a "fraudulent conveyance in contemplation of insolvency," they should first have obtained judgment and return of no property found against her.

Article 2 of chapter 44, under which the suit was instituted, does not require "judgment and return of no property" by a creditor before attacking such conveyances—

1st. Because courts of equity are expressly given jurisdiction and control of such transfers upon the filing of a petition by any person interested within six months after the mortgage or transfer. (§ 2, *Ibid.*)

2d. Any person or number of persons interested, no matter whether their interest be manifested by judgment or otherwise, may unite in the petition. (§ 3, *Ibid.*)

3d. As the petition must be filed within six months after the mortgage or transfer shall have been lodged for record or the delivery of the property or effects transferred, to require judgment and return of no property found before the petition shall be filed would render the statute almost useless, and defeat many creditors by the delays which could be resorted to by debtors to prevent such judgments and returns before the expiration of the six months.

But although this alleged error does not exist, the other grounds on which she seeks a reversal are tenable, and will be briefly treated.

Griffith v. Cox, &c.

The statute does not authorize the appointment of a receiver, except to take charge of all the property and effects in the possession or under the control of the *transferee* or *the person to whom* the sale, mortgage, or assignment shall have been made. This may be done at any time pending the action, and upon such terms as the court, in the exercise of a sound legal discretion, may deem proper; and it may make such orders respecting the property as may be made concerning attached property.

But we have been unable to find any law authorizing such receiver to take possession of property which the transferor, vendor, mortgagor, or assignor has not transferred, sold, mortgaged, or assigned, unless it shall have been first decided that the sale, mortgage, or assignment was made in contemplation of insolvency and to make an illegal preference among creditors.

It is true, by section 298, Civil Code, a receiver may be appointed "on the motion of any party who *shows* that he has, or probably has, a right to a lien upon, or an interest in, any property or fund the right to which is involved in the action, and that the property or fund is in danger of being lost, removed, or materially injured;" but the appellees failed in this case *to show* such an interest in the property or danger of its being lost as described in that section of the Code.

While a mortgage was executed by the appellant, the possession and control of the property mortgaged never passed to the mortgagee, and therefore the court had no power under the statute to compel its surrender to the receiver before it was decided that the mortgage was in violation of law, unless the facts and conditions specified in section 298 of the Civil Code were shown.

Griffith v. Cox, &c.

So in either aspect of this case, whether to take possession of appellant's property, which she did not mortgage, or to compel the surrender of that which was mortgaged to the receiver, his appointment was illegal.

We suppose, upon a proper state of facts, that the ancillary remedies by attachment, injunction, or the appointment of a receiver, might be resorted to in an action under this statute, to preserve the property from removal or destruction, as in actions generally; but without some such predicament, it was not intended by the statute we are considering to authorize the court to compel the surrender to a receiver of any property, except such as may be placed in the possession or control of the mortgagee or transferee by the mortgagor or transferrer, until after it shall have been decided that the act which may be in question is within the interdiction of the statute. And this power is not arbitrary, but must be exercised with sound judicial discretion to accomplish the real purpose of the statute. (Section 4, article 2, *Ibid.*)

The whole of appellant's property was illegally taken from her and sold before any judgment was rendered that the mortgage was made either in contemplation of insolvency or with the design to prefer creditors.

And after she was thus stripped of her property and deprived of her home, the court, in face of the commissioner's report, which showed that she was solvent when the mortgage was executed, and had remained so, decreed that she had made the mortgage in contemplation of insolvency. This decree is erroneous.

For so long as a debtor remains solvent, no sale, mortgage, or assignment by him or her can be held to have been made-

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in contemplation of insolvency, unless actual fraud be alleged and proven.

Upon the return of this cause, so far as it may be in the power of the court to do so, the appellant should be placed in *statu quo*.

She is entitled to her property in specie, unless some innocent judicial purchaser has rights which supervene.

And if her property cannot be restored to her in specie, the creditors who participated in this action and the receipt of her property should be required, upon rule or supplemental pleading, if she so proceeds within proper time, to pay or return to her all money or property received by them or either of them, or collected from her through the instrumentality of this suit. They should also be required to account to her for the reasonable value of the rents and profits of the land and interest on the personalty sold under the decree until full restitution shall be made to her.

The attorneys' fees must also be restored.

Wherefore, the judgment is reversed, and cause remanded, for further proceedings consistent with this opinion.

CASE 120—ORDINARY—DECEMBER 3, 1881.

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APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

1. The act "authorizing the Auditor to appoint agents to attend to revenue matters; approved April 29, 1880, is constitutional.
2. The subject of the act is sufficiently expressed in the title.
3. The agent is a mere subordinate, and his term ends with that of the Auditor appointing him.
4. The act does not interfere with the duties of the assessor, but requires that to be done which he has omitted to do, and has no power to do, after the return of his books has been made to the county court.
5. The penalty is retrospective, and cannot be enforced.

79	567
91	479
79	567
92	232

79	567
114	425

79	567
127	704

79	567
128	618

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BYRON BACON AND BLIJUR & DAVIE FOR APPELLANT.

1. The Auditor's Agent acts of 1880 are void, because they take from the assessor and the sheriff, two elective constitutional officers, a portion of the powers and emoluments of their offices, and because they devolve those powers upon an appointive officer created by the legislature. (Morehead St., 180-185, vol. 2, 1377; Loughborough's Dig., 514-516; Rev. Stat., 192-198; Gen. Stat., 154-160; Cooley's Const. Lim., 276; Thompson v. Carr, 13 Bush, 215; Auditor v. Holland, 14 Bush, 153; Speed v. Crawford, 3 Met., 211; 26 Miss., 412; 65 N. C., 609; 7 Hill N. Y., 82; 2 Denio, 272; 29 Cal., 449; 34 *Ib.*, 470; 37 N. Y., 428; Gen. Stat., 120; sec. 10, art. 6, Constitution.)
2. The second of the two acts (Acts 1879, volume 1, page 205) further illustrates the objectionable character of this legislation. (Robeson v. Huff, 3 Litt., 39; 16 Ohio, 519; 11 Minn., 321; 4 Otto, 413; Cooley's Const. Lim., 352; Blackwell's Tax Titles, 213-215; 5 Otto, 715; Robinson v. Swope, 12 Bush, 27; Cooley on Taxation, 279, 280.)
3. The subject of the act is not embraced in the title.

ALEX. HUMPHREY AND RUSSELL & HELM FOR APPELLEE.

1. The subject of the act is embraced in the title. (Phillips v. Covington and Cin. Bridge Co., 2 Met., 221; Johnson v. Higgins, 3 *Ib.*, 569; Collins v. Henderson, 11 Bush, 79; McReynolds v. Smallhouse, 8 Bush, 450; Smith v. Cochran, 8 Bush, 111; 8 *Ib.*, 352.)
2. The act is not repugnant to section 10, article 6, of the constitution. (Speed & Worthington v. Crawford, 3 Met., 209.)
3. It is premature to argue the alleged retrospective feature of the act. (Cooley's Const. Lim., 178; Rushing v. Sebree, 12 Bush, 199; *Ib.*, 392; 2 Duv., 479.)

JUDGE PRYOR DELIVERED THE OPINION OF THE COURT.

The relator, S. M. Barker, filed this petition in the Jefferson court of common pleas, in the name of the commonwealth, asking a mandamus against W. B. Hoke, as judge of the Jefferson county court, compelling the latter to act on the information given him with reference to the failure of one Keegan to list his property for taxation.

S. M. Barker, at whose instance this proceeding is had, was appointed by the Auditor Auditor's Agent, under an act of the general assembly, approved April 29th, 1880. By virtue of the provisions of that act, the duty is imposed on the agent of filing information against those who have

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not given in a proper list of their taxable property, so as to enable the county court to require the payment of taxes upon it.

It is alleged in the petition that such an information had been filed in the county court of Jefferson county against Keegan, and the judge of that court had refused to hear the complaint of the commonwealth on the ground that the act was unconstitutional. It is also alleged that it was the duty of the court under the act to assess the property for taxation, if, upon the hearing, it should be made to appear that the owner had failed to list it, or to pay the state the taxes.

There was a demurrer filed to the petition, and also an answer, in which it is alleged that the county court refused to hear the case because he deemed the information insufficient. This answer, unexplained, might present an obstacle to the proceeding by mandamus to compel action on the part of the county judge; but the opinion delivered by him in that case, or the reason for not proceeding to hear the case, is, that the act being unconstitutional, the court had no power to proceed under it, and such we understand to be the position of counsel in the oral argument of this case. So the question will be treated as if the court had refused to proceed when the commonwealth made out the case upon the ground the act was unconstitutional, and the court had no power over it.

The judge of the circuit court, in awarding the mandamus, did not undertake to direct the county court as to the manner in which the discretion of that court should be exercised, but left all such questions to be considered when the facts of the complaint are made known.

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All that is required of the county judge by the mandate from the superior court is, that he shall take cognizance of the case for the purpose of determining whether the information is true or false. The listing of the property by the county judge and ascertaining its value are essentially ministerial acts, and all that the circuit court judge has said is, that it is the duty of the county court to hear the complaint when properly made.

The constitutionality of an enactment conferring on the county court the power to assess the property of delinquents was expressly decided by this court in the case of Pennington v. Woolfolk, 79 Kentucky Reports. It was there held that ministerial and judicial powers were blended in that tribunal, and to hold otherwise would divest it of a jurisdiction always recognized, and render invalid many of the statutes giving it a supervisory power in a ministerial character over county officials.

This power of the county courts over delinquent taxpayers has existed by reason of legislation since the formation of the state government, and such jurisdiction, when properly conferred, has always been recognized, not only as constitutional, but as vested in a tribunal peculiarly adapted to the proper determination of all such questions.

The awarding of the mandamus was therefore proper, unless other constitutional inhibitions have been disregarded in the enactment of this law. It is insisted the act is unconstitutional: 1. Because the subject of the act is not expressed in the title. 2. The agent Barker is not an officer, for the reason there is no term fixed for the office. Because it confers on the department of Auditor the duties, powers, and emoluments of the county assessor.

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Article 2 of section 37 of the state constitution provides, that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." The act under consideration is entitled, "*An act authorizing the Auditor to appoint agents to attend to revenue matters.*" It is urged in argument, that in reading the title of this act the mind would be led to the conclusion that it was merely an act to relieve the Auditor from the burden of the revenue department by allowing him to appoint agents or assistants in such counties as he might see proper.

We concur with counsel that such would be the conclusion, but it would suggest, in addition, an inquiry as to the power conferred on the agent, and the business he was authorized to transact with the department in order to relieve the Auditor. The latter, by article 10 of chapter 92, General Statutes, had been clothed with the authority of receiving from banks and other like corporations the amount of taxes due for each year, and of receiving reports from railroad and turnpike road companies, so that their taxes might be paid directly into the treasury; and in the attempt to collect from the delinquent tax-payer, it was manifest that the Auditor could not leave his office for the purpose of visiting each county, so as to file an information against those who had avoided the payment of tax; and to relieve him of this duty, he was empowered to employ agents to discharge such duties, and these agents, when appointed, were at once connected with his department, and subject to his control.

The Auditor is the head of the department, with clerks and agents under him, all of whom are guided by him in the discharge of their respective duties, and the very purpose of the act was to require this agent, the appointee of

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the Auditor, to perform certain minor ministerial duties outside the doors of the office that the Auditor was not expected or required to perform.

The title Auditor's Agent was itself suggestive, to any mind acquainted with the past legislation of the state, as to the duties conferred by the act; and while such a title may not be sufficiently comprehensive to direct an inquiry as to the power conferred, it was certainly suggestive; and when you add to it the words, "*to attend to revenue matters*," it would certainly induce the legislator to examine its provisions with a view of ascertaining what matters pertaining to the revenue this agent, when appointed, was required to look after.

It is insisted, however, the agent is required to perform the duties that the Auditor (his principal) cannot exercise, and acting independently of the Auditor. The title of the act does not indicate the exercise of a power by the agent that is withheld from the principal. It was certainly not expected that the Auditor could discharge, in person, all the duties pertaining to his office, and necessary to the collection of the tax from the delinquent tax-payer; and therefore the agent had assigned to him certain specified duties that are not required to be performed by his principal.

The act conferring these powers on the agent does not create an independent office, or make the action of the Auditor subordinate to that of the agent. On the contrary, the agent holds his office at the mere will of the Auditor, and is subordinate to the will of the latter in all his actions with reference to the revenue.

The very language of the act, as well as the title, was designed to make the agent subordinate to his principal. He appoints him in the first place, takes from him a bond, and

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the result of all his action, whether in the county court or elsewhere, is required to be certified to the Auditor. He can remove him at his will, and the mere fact that the Auditor is not to proceed in person to give the information to the county court, or to recover the money from the taxpayer, if paid without the information, does not create an independent office. The entire supervision of the revenue department, so far as these agents are concerned, is under his control; and conceding the fact that he is not authorized to discharge some of the duties imposed on these agents, and still the title of the act is not misleading.

This court, in the case of *Phillips v. the Cincinnati and Covington Bridge Company*, reported in 2 Metcalfe, in discussing the object and effect of the constitutional provision in question, said: "It should not be so construed as to restrict legislation to such an extent as to render different acts necessary when the whole subject-matter is connected, and may be properly embraced in the same act." And again: "None of the provisions of a statute should be regarded as unconstitutional when they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title."

In the case of the *Louisville and Oldham Turnpike Road Company v. Ballard*, 2 Metcalfe, it is said: "A more liberal construction of this clause of the constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation."

This character of construction has been followed in the cases of *Johnson v. Higgins*, 3 Met.; *Smith v. Cochran*, 8 Bush; *O'Bannon v. Louisville and Lexington Railroad Company*, 8 Bush; *Jacob's adm'r v. Louisville and Nash-*

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ville Railroad Company, 10 Bush, and numerous other cases; and when applied to the title of the act before us, we find each provision has a connection with the subject expressed in the title.

The subject is, in fact, *revenue* matters. The Auditor is the chief officer of the revenue, and he is by this act authorized to appoint *agents to attend to the revenue*. The information, the summons, the action of the county court, all have a direct connection with the subject-matter expressed in the title. They all have a natural connection, and no provision to which our attention has been called can be said to be foreign to the title.

The title to an act obviously delusive, or when the body of the bill is foreign to the title, is unconstitutional: as when the title is to amend an act relating exclusively to *attorneys*, and the subject of the act is revenue and taxation, such a title is deceptive and misleading, and was held by this court, in the case of *Pennington v. Woolfolk*, to be unconstitutional.

We are satisfied the subject of legislation found in this enactment is sufficiently expressed in the title.

As to the second constitutional objection made by counsel, we are of the opinion that the agent is not an officer within the meaning of the constitution, and there was no necessity for limiting his term of office. He occupies the same relation to the Auditor that clerks in his department do. These are all agents with particular duties assigned to each, and are to the Auditor what the deputy of the sheriff or the deputy of the clerk is to his principal—the term of the agent expiring with the term of his principal.

Section 25 of article 3 of the constitution provides: “A Treasurer shall be elected by the qualified voters of the state

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for the term of two years, and an Auditor of Public Accounts, Register of the Land Office, and Attorney General for the term of four years. The duties and responsibilities of these officers shall be prescribed by law: *Provided*, That inferior state officers, not specially provided for in this constitution, may be appointed or elected, in such manner as shall be prescribed by law, for a term not exceeding four years."

Section 10 of article 6 provides: "The general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as shall, from time to time, be necessary and proper."

Section 6 of article 6 further provides: "Officers for towns and cities shall be elected for such terms, and in such manner, and with such qualifications, as may be prescribed by law."

In the bill of rights, article 13, section 28, is found this provision: "That the general assembly shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer time than for a term of years."

The leading purpose of calling the convention of 1849 was to abolish the power of appointment to office for life, and to substitute the elective system with certain and fixed terms of office.

In construing these several provisions of the constitution relating to officers and their terms of office, this court held, in the case of *Speed & Worthington v. Crawford*, reported in 3 Metcalfe, that town and city officers should be elected; and the power conferred on the chancery court of Louisville to appoint certain officers for that city was adjudged to be in violation of article 6, section 6, of the constitution requir-

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ing all such officers to be elected. The attempt to vest the power of appointment in the chancellor was in plain violation of section 6 of article 6 of the constitution. The court in that case proceed further to say, that the act was unconstitutional, because in violation of the provision of the constitution requiring the legislature to prescribe the terms of other officers than those mentioned in the constitution. Whether, if the power to appoint had been properly exercised, the court would have held the appointment void, was not determined in that case, nor was the question as to the term of the office involved in the issue raised. Still the decision in that particular case does not affect the question here; nor were the officers in that case the mere agents of the chancellor, or authorized to perform any duty connected with the chancery court of Louisville.

In the case of Offutt v. the Commonwealth, reported in 10 Bush, the question was, whether the trustee of the jury fund was a county officer within the meaning of the constitution, and if so, were his sureties liable for his acts after the expiration of four years (the duration of his term), the trustee holding over?

The statute provides that a trustee of the jury fund shall be appointed for each county by the circuit court, and shall hold the office for the term of four years. This court said: "The office is of that class provided by section 10 of article 6 of the constitution, as follows: 'The general assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial and executive officers as shall, from time to time, be necessary and proper.'"

These cases are cited to show the limitation placed upon the power of appointment to office by the various provisions

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of the constitution, and the action of this court in determining the application of these provisions to the particular cases, and in no instance has it been held where the term of the principal has been fixed, it becomes necessary to prescribe the duration of the term of the agent or deputy acting under him. The expiration of the term of the principal must necessarily end that of the agent, and the mere fact that the agent may be assigned by the act creating him to the discharge of certain duties the principal is not required to discharge, or is not authorized to perform, will not, and does not, make the agent or the deputy such an officer in the meaning of any provision of the constitution as requires that his term of office should be defined. He is nevertheless the agent of the Auditor, and the term being prescribed for the one, fixes a certain and defined term for the other, subject to the power of removal by the principal as authorized by the act.

It is argued, however, that the terms of office of the various clerks in the Auditor's department have been fixed by law, and that this is a legislative construction of the provisions of the constitution referred to. The terms of the clerks in the Auditor's office are fixed, and end at the same time the term of the Auditor expires; but this is no argument in favor of the position assumed by counsel in this case.

The legislature doubtless deemed it unwise to place the power with the Auditor of removing all his subordinates at his mere will, and therefore, when the appointment is made, and the position assumed, it is irrevokable on the part of the Auditor, unless for cause. The clerk to that extent is made

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independent of the Auditor, and the patronage of the latter, once bestowed, cannot be withdrawn for any selfish purpose.

While an office may be defined to be a public position or employment, and a deputy in that sense regarded as an officer, it was never contemplated by the framers of the constitution that agents, clerks, and subordinates of the principal officers of the state and counties should have their term of office defined. The term of the Auditor being fixed, his clerks and agents under him, subject to his supervision and control, and to enable him to execute or have executed all the duties of his office, are mere subordinates, whose terms end with the term of the principal.

It is said, however, that the agent is required to execute a bond, and take an oath, &c. So of almost every deputy or agent of a state or county officer; and while their bonds are generally executed to the principal, the fact that the bond in this case is required to be executed to the commonwealth, and approved by the Auditor, can make no difference. The agent in the transaction of his business is not always under the eye of the Auditor, and the legislature for that cause did not deem it just or proper to make the Auditor personally responsible for his acts, but gave to the latter the general supervisory power over him, with the right to displace him at his will and pleasure.

It seems to us the principal inquiry on this branch of the case is, does this agent, when appointed, occupy a subordinate position to and under the Auditor? If so, he is not an officer whose term should be fixed, for the reason already indicated, and the fact that his peculiar duties are assigned him, and those of the Auditor enlarged by the act authorizing his appointment, does not affect the decision of the question made.

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While the officer in this case cannot, in a strict legal sense, be denominated an agent, he is a mere subordinate in a department, holding his office at the will of its chief officer, and it cannot well be adjudged under any reasonable construction of the constitution that the subordinate holds for a longer term than the principal. The construction given the various provisions of the constitution in this case carries out the legislative will, and violates no provision of the organic law.

In the third place, it is maintained the act is void because it confers on the Auditor or his agent the duties, powers, and emoluments of the assessor. It is said the Auditor's agent is required to do that which the assessor should do. It would be more aptly stated in saying that the Auditor or the agent is required to do that which the assessor has omitted to do, and which he has no power by virtue of his office to do. This act in no manner interferes with either the office of assessor or sheriff, or the emoluments belonging to either. The assessor and sheriff are both constitutional officers, with their terms prescribed by the constitution and their duties defined by law.

The assessor, during his term of office, is required to list the property within his county for taxation during each year, and to make a return of his assessor's books at a fixed period during each year to the county clerk. He is also required to return a delinquent list; and after discharging such duties for the current year, his power over the subject-matter for that year ceases. He is without power to re-assess or re-value any property, but this is all left to the county court and the revisory board. Persons omitted to be listed, when reported by the sheriff, may have the property assessed

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by the county clerk. A board of supervisors is also constituted in each county, with power to correct any error committed by the assessor, or report to the county court the names of persons omitted to be listed by him. (See General Statutes, page 723, title "Revenue and Taxation.") The power of the assessor is gone with the return of his books for the current year, and the right to supervise his action confided to certain county officers designated by the statute. The state, in addition to the board of supervisors, has authorized this agent of the Auditor to give information, and take other steps in the county court of the county where the tax-payer resides, to enable the county court to rectify the errors, and supply the omissions of duty on the part of the assessor, arising either from neglect on his part, or from an unwillingness on the part of the tax-payer to disclose his taxable estate. This agent is required to give information to a tribunal (the county court) that has always, under legislative authority, exercised this supervisory control, and in the exercise of this power we perceive no constitutional objection. It is no appropriation of the emoluments of the assessor to authorize another to correct his mistakes committed while in office, nor is his successor in office vested with any right, by virtue of the office, to supervise this work.

The sheriff is required to collect the tax when ascertained by the county court, and it is only in cases where the party proposes to pay before any steps are taken against him that the agent is authorized to receive the money, or in cases where the money is paid after judgment and before execution. The party is delinquent, and the sheriff has no power or right to collect the tax, and it is unreasonable to say that in

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such cases the money cannot be paid directly to the agent or the Auditor, but must pass through the hands of the sheriff.

While the penalty attempted to be annexed for the failure to list the property, when no such penalty existed at the time of this omission of duty, cannot be enforced, still it does not affect the substantial provisions of the act or present any obstacle in the way of enforcing the collection of the tax. The act was evidently intended to clothe the county court with the authority to ascertain these delinquent tax-payers, and to compel them to contribute their portion of the common burden, and is retrospective in its operation. The penalty, therefore, may be disregarded, in so far as it applies to a failure to list before the penalty was annexed, and when stricken out, if that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. (Cooley's Constitutional Limitation, page 215.) The right to enforce the penalty can be denied, and the main features of the act enforced. Our attention has not been called to each section of the act in question, or its practical operation, but it is plain that the county court should hear and determine the question made on the information of the relator Barker. This court is not to be understood as deciding that if the relator held an office within the meaning of the constitution at the mere will of the legislature or the Auditor, that his acts would be void or the act unconstitutional. It might well be argued, where the term had not been fixed beyond the constitutional limit, that the provisions of the organic law would supply the defect in the act, and render it operative for the constitutional period. This latter question is waived.

Weddington &c., v. Commonwealth.

The judgment above is affirmed. The original action was filed in the common pleas court, and transferred to the Jefferson circuit court, and there decided.

CASE 121—FORFEITED BAIL BOND—DECEMBER 8, 1881.

Weddington, &c., v. Commonwealth.

APPEAL FROM ELLIOTT CIRCUIT COURT.

The fact that a party who has forfeited his bail-bond could not appear without danger of losing his life by mob violence will not exonerate the bail, unless the proper authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear.

J. W. HANNAH, M. M. REDWINE, Z. T. YOUNG, AND V. B. YOUNG
FOR APPELLANTS.

As the accused was unable to appear without danger of losing his life, his bond should not have been forfeited.

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

The question in this case is, whether appellants, who were bail for the appearance of one Coun, charged with murder, are exonerated because the accused could not appear without danger of losing his life by mob violence. The evidence shows that at that time the county of Elliott, in which the proceedings were had, was overrun by a band of so-called regulators; that they had killed several persons, and had shot and seriously wounded the accused, and had threatened to take his life whenever they might find him, and that by reason of these threats the accused was compelled to abscond.

It is contended by counsel, that as it is the duty of the commonwealth to protect the lives of her citizens, that it ought not to require the citizen to discharge any duty, or to

 Warfield, &c., v. Gardner's adm'r.

comply with any obligation to the commonwealth, when such protection is not extended, and that the bail should be exonerated, as in case of sickness of the accused, which renders it physically impossible for him to attend in response to his bond. This ought unquestionably to be true when the constituted authorities are unable or indisposed, when properly called upon, to protect the citizen in the discharge of the duty; but in this case appellants made no application for protection to the accused, and do not in any way show that the authorities were either unable or unwilling to extend the protection necessary to enable the accused to appear. It does not come in the category of cases where the accused is prevented from appearing by the act of God.

Judgment affirmed.

Judge HARGIS not sitting.

CASE 122—ORDINARY—DECEMBER 8, 1881.

Warfield, &c., v. Gardner's adm'r.

APPEAL FROM HARDIN CIRCUIT COURT.

1. In order to enable a defendant to plead, as a counter-claim or set-off, a claim against the estate of a decedent, it must be verified and proved in the manner required by law in the case of claims sued upon by original action, but demand may be dispensed with.
2. An affidavit in the body of the answer is not sufficient. The claim should be verified and proved in the manner required by law and filed *with* the answer.
3. The allegation in the petition that the plaintiffs were, by an order of the Hardin county court, appointed administrators, and qualified as such, is a substantial compliance with section 122, Civil Code, as the law raises the presumption that the order was *duly* made.
4. The failure of the petition to state facts showing that the Hardin county court had jurisdiction to make the order should have been taken advantage of by special demurrer.

79	588
96	308
79	583
101	96

79	583
126	601

79	583
136	788

Warfield, &c., v. Gardner's adm'r.

WILSON & HOBSON FOR APPELLANTS.

1. The petition does not state facts showing that the Hardin county court had jurisdiction to appoint appellees administrators, nor does it allege that the order of appointment was "duly" made. (Sec. 122, Civil Code.)
2. When a claim against a decedent's estate is pleaded as a set-off, demand is not necessary. (Millet, &c., v. Watkins, 4 Bush, 642; Bennett v. Crocklin, 3 Met., 322; Civil Code, sec. 732, subsec. 32.)

J. C. POSTON FOR APPELLEES.

1. Any defect in the petition is cured by the answer. (Civil Code, secs. 134, 756; Combs, &c., v. Jefferson Pond Draining Co., 3 Met., 72; Louisville and Portland Canal Co. v. Murphy's adm'r, 9 Bush, 529 and 530.)
2. A claim against a decedent's estate, pleaded as a set-off, should be verified and proved, and payment demanded, as in case of claims sued on by original action. (Civil Code, sec. 732, subsec. 34; sec. 437; Gen. Stat., chap. 39, art. 2, secs. 35 to 39.)
3. The affidavit contained in the body of the answer was not sufficient. The claim should have been so verified and proved as to be a voucher for appellees. (Leach v. Kendall's adm'r, 13 Bush, 424.)

A. B. MONTGOMERY FOR APPELLEES.

1. The defect in the petition, because of its failure to state facts showing that the Hardin county court had jurisdiction to appoint the plaintiffs as administrators, should have been taken advantage of by special demurrer. (Sec. 92, Civil Code.)
2. Even though demand may be dispensed with where a claim against a decedent's estate is pleaded as a set-off, it is certain that verification and proof cannot be dispensed with. (Code, 1854, sec. 473; Code, 1877, sec. 437; sec. 732, subsec. 34; Millet v. Watkins' adm'r, 4 Bush, 642.)
3. Appellant's cause of action does not arise on a contract, judgment, or award, and therefore cannot be pleaded as a set-off. (Civil Code, sec. 96, subsec. 2.)

There is a response to petition for re-hearing.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

This is an action by appellees, administrators of the estate of A. S. Gardner, deceased, upon a promissory note given by appellants.

At the September term, 1877, of the court, a general demurrer to the petition was filed and overruled. There-

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upon appellants filed their answer, in which one of them, Warfield, pleaded a demand against the estate for rent of land as a set-off. At the February term, 1879, a rule was made by the court, requiring Warfield to show that he had made a demand of appellees for payment, accompanied by his affidavit and proof of the claim as required by law in such cases.

At the same term, appellants having failed to respond to the rule, judgment was rendered making the rule absolute, and dismissing the set-off, and also for the amount of the debt claimed in the petition. But upon grounds filed, a new trial was granted.

At the August term, 1879, Warfield filed a response to the rule, stating, in substance, that he had, on the 20th of August, 1879, demanded of the administrators payment of his claim, and also filed copies of certain title papers and affidavits of other persons in regard to the land, the rents from which he claimed as set-off.

Upon filing the response, appellants asked leave to re-file their answer and set-off, which was refused, and judgment again rendered for the debt claimed in the petition.

From that judgment this appeal has been taken.

The only questions presented by the assignment of errors necessary to be considered are—

1st. Whether the demurrer to the petition was properly overruled.

2d. Whether the court erred in refusing to permit appellants to re-file their answer and set-off.

First. The allegation in the petition, that appellees were, by an order of the Hardin county court, appointed administrators of A. S. Gardner, deceased, and qualified as such, is a substantial compliance with section 122, Civil Code. The

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law raises the presumption that the order when made was "duly" made.

The defect in the petition, on account of the accidental omission of the words "the defendants," the subject of the verb "agreed," does not affect the substantial rights of appellants, because they were neither prejudiced or misled thereby. "The omission of those things which are silently expressed is of no consequence."

The objection that the petition fails to state facts showing that the Hardin county court had jurisdiction to appoint appellees administrators involves their want of legal capacity to sue, and can be taken advantage of by special demurrer only, and as no special demurrer was filed in the court below, that objection must be regarded as waived by appellants.

As to the second question: This court in the case of Millett v. Watkins, 4 Bush, 642, in construing section 473 of the Civil Code of 1854, held that a set-off is, neither in the common or legal acceptance of the word, a "suit" or "action," and therefore that the demand required to be made by a claimant before bringing a suit or action against a personal representative did not apply to a set-off. It was not, however, decided in that case that the verification of the claimant, by written affidavit and proof of the demand, could be dispensed with.

But by subsection 34, section 732, of the present Civil Code, the word "action" is construed to embrace a demand for a set-off or counter-claim, and by subsection 37 the word "sue" is construed to refer to an action or special proceeding.

If a set-off is to be considered an action in the meaning of section 37, chapter 39, General Statutes, and that section

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is literally enforced, no set-off can be pleaded or recovery had upon it for a claim against the estate of a deceased person until such affidavit and proof are made, nor until demand of payment thereof has been made of the personal representative, accompanied by affidavit of its justice.

The reason for requiring a claimant, before bringing an original action against a personal representative, to make demand of him for payment, is, that if the claim is just and properly proved, it may be paid without subjecting the estate to the costs of litigation. But the reason for requiring the demand to be made ceases when the personal representative begins litigation himself. Though such is not the case in respect to the affidavit of the claimant and proof of the justice of the claim. And we are of the opinion that both the letter and spirit of the law, as it now is, require that a claim against the estate of a decedent, which is pleaded as a set-off or counter-claim, should be verified by the written affidavit of the claimant, and proved in the manner required by law in the case of claims sued upon by original action, and that the personal representative may, when the defendant has not complied with the law in this respect, obtain a rule against him, and upon his failure or refusal after such rule to verify and prove his claim in the manner required by law, his set-off or counter-claim should be dismissed.

Though in this case it is alleged in the answer of appellants that the demand is just, and has never been paid, and that there is no offset or discount against the same, nor any usury therein, it does not appear that the claim was either presented or filed in such manner as would authorize the personal representative to admit or controvert its justice. It should have been verified by the written affidavit of the

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defendant, and also proved in the manner required by law, and filed with the answer.

The response of appellants to the rule against them was insufficient, and as their set-off had been once dismissed for failure to comply with the law in such cases, the court did not err in overruling their motion to re-file it, as the claim attempted to be pleaded as a set-off was not so verified and proved.

Wherefore, the judgment is affirmed.

CASE 123—EQUITY—DECEMBER 10, 1881.**Barbee v. Fox, &c.**

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. By section 445, Myers' Code, it is not required that it shall appear upon the order-book that a motion was formally made by the non-resident to set aside the judgment against him. Where, as in this case, he has given security for costs, and filed a pleading asking that the judgment be set aside, a previous appearance and motion by him for a new trial is necessarily implied.
2. When a non-resident, within five years after the rendition of a judgment for the sale of his land, appears and gives security for costs, and is admitted to make defense, section 445, Myers' Code, imperatively requires that the case shall be re-tried, and upon the re-trial the court may confirm the former judgment, modify it, or set it aside.
3. The charter of the city of Louisville of 1851 provided that a decree directing a sale of the land of a non-resident to satisfy the lien of a contractor should make provision for the redemption of the property at any time within three years. The decree in this case did so provide, but the sale was confirmed absolutely, and a conveyance ordered to be made to the purchaser immediately, he being in possession. The order of confirmation was, on motion of the heirs of the non-resident made within five years, set aside, but the sale was again confirmed, and three years allowed in which to redeem.
Held—1. That the reservation in the judgment of the right to redeem did not obviate the necessity of reserving that right in the

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- order of confirmation. 2. The order of confirmation should have been modified and not set aside, but appellants were not prejudiced by the action of the court. 3. The limitation of three years begins to run only from the date of the last order of confirmation.
4. Under the charter the court had no right to require appellees, as a condition of the right to redeem, to pay taxes levied previous to the sale.

RUSSELL & HELM FOR APPELLANT.

1. The paper filed by appellees, styled an answer and cross-petition, is not a motion to have the action re-tried, and appellees not having complied with the law by appearing and moving to have the action re-tried within the time prescribed by law, are deprived of any right to make defense. (Kinney v. O'Bannon, 6 Bush, 692.)
2. The report which the order of June 24th, 1870, confirms, expressly reserves the right to redeem, which is equivalent to an express reservation of that right in the order.
3. The court should have confirmed that order, instead of setting it aside and entering a new one.

GEO. B. EASTIN AND JAMES S. PIRTLE, OF COUNSEL FOR APPELLANT.

J. R. BOONE FOR APPELLEES.

Brief withdrawn.

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

In 1855 McAtee brought an action in the Louisville chancery court under an act of the general assembly, entitled "An act to charter the city of Louisville," approved March 24, 1851, for the purpose of enforcing his lien as contractor upon certain lots of land belonging to Thos. W. Fox. In pursuance of the judgment rendered in the action, the lots were, February 23, 1857, sold by the marshal of the court, and purchased by appellant Barbee. The sale was reported to court, approved, and confirmed, and a deed made to appellant.

Thos. W. Fox was at the time a non-resident of the state, and before the court by constructive service of process only:

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and it now appears died between the time the sale was made and the order of court confirming the report of sale.

June 25, 1869, the action was reinstated on the docket, and McAtee, for the use of Barbee, filed a supplemental petition for the purpose of having the report of sale again approved and confirmed.

The heirs at law of Thos. W. Fox, deceased, were, by the supplemental petition, made parties to the action, and brought before the court by constructive service of process.

June 24, 1870, the action being submitted for trial, an order of court was made, again approving and confirming the report of sale made in 1857.

June 23, 1875, appellees, heirs at law of Thos. W. Fox, filed in court a paper called by them an answer and cross-petition. In it they allege they were non-residents, and ignorant of the proceedings had in the action until a few days before filing their answer and cross-petition; that no bond was executed by the plaintiff, as required by the Civil Code, previous to the order of June 24, 1870; that the right to redeem the lots within three years, as provided in the act under which the proceedings were had, was not reserved to them in the order of confirmation; that one of the defendants in the action has since his birth been of unsound mind and incapable of transacting business, and was not represented in the action previous to the confirmation of the sale by a guardian or committee, and that the entry of Barbee upon the lots was wrongful, and his attempt to convey the same to Ray was fraudulent on the part of both of them. They asked for possession of the lots; that the order of June 24, 1870, be set aside, and they be permitted to pay the debts due on the lots and satisfy the judgment against their deceased father, Thos. W. Fox.

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September 24, 1875, appellants moved the court to strike from the files the answer and cross-petition, and October 9, 1875, appellees filed exceptions to the report of sale made by the marshal in 1857.

November 3, 1876, the court made an order sustaining the motion to strike from the files the paper filed June 23, 1875, so far as it purported to be an answer and cross-petition, but retaining it as a motion for re-trial of the application to confirm the marshal's report of sale and as exceptions to said report.

June 30, 1879, the court rendered judgment. By that judgment the order of June 24, 1870, confirming the report of sale, was set aside, the exceptions filed by appellees overruled, and the sale finally approved and confirmed; but to appellees was reserved the right, at any time within three years from the date of the judgment, to redeem the property sold by paying to Barbee, the purchaser, the sum bid by him, and interest thereon at the rate of ten per cent. per annum, from February 23, 1857, until paid, and all taxes and levies made subsequent to the sale, and if not redeemed, the sale to be final. An order was also made restoring the possession of the lots to appellees.

From that judgment this appeal is prosecuted, and the objections made to it will be considered.

So much of section 445, Myers' Code, as applies to this case, is as follows: "When a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may, at any time within five years after the rendition of the judgment, appear in court and move to have the action re-tried, and security for costs being given, they shall be admitted to make defense; and thereupon the action

shall be re-tried as to such defendants as if there had been no judgment, and upon the new trial the court may confirm the former judgment, or modify or set it aside," &c.

Appellants contend that appellees did not, within five years from the time the order of confirmation was made, appear in court and move to have the action re-tried as required by that section of the Code.

It is true, the record does not show that they complied literally with the requirement of the Code by making a formal motion to have the action re-tried. They did, however, give security for costs, and file their answer and cross-petition in open court. In our opinion it is not necessary that a motion to have the action re-tried be entered *in haec verba*. The execution of the bond for costs, and order of court directing their pleading to be filed, imply both the appearance of appellees in court and motion for re-trial.

Appellants contend also that the court erred in permitting appellees to file exceptions to the report of sale on the 9th of October, 1875, which was after the expiration of five years from the order of confirmation, and also overruling their motion to strike from the files the paper filed by appellees June 23, 1875, and treating it as a motion for a re-trial of the application to confirm the report of sale, and as exceptions thereto.

Appellees having within five years from the date of the order of confirmation acquired a standing in court by a substantial compliance with the requirement of the Civil Code, and also filed a paper which, though called by them an answer and cross-petition, was subsequently permitted by the court to remain on file and be treated as exceptions, had the same right to amend their pleading or proceeding as they would have had under section 161, Myers' Code,

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if they had been present in court before the order was entered.

In our opinion, therefore, it was not an abuse of the discretion given to the court in such cases to permit the exceptions to be filed October 9, 1875.

The paper filed the 23d of June, 1875, cannot be properly considered a motion for re-trial, because the filing it followed and was the result of the motion. But so far as it contained exceptions to the report of sale, or grounds for setting aside the order of confirmation, it was proper to retain and so consider it. And it was even proper to file it as an answer to the supplemental petition of appellants, and being filed as such, the only way it could have been properly disposed of was by demurrer, and that would have reached to the supplemental petition.

In the latter were two allegations: *First*, that Thos. W. Fox died previous to the first confirmation of sale. *Second*, that Barbee took and held possession of the lots in good faith, and believing them to be his own, sold to Ray.

The first allegation is a statement of a fact that rendered the first confirmation of sale void, and changed his attitude from that of a rightful owner and holder of the property to that of a mere bidder at the sale. The other we do not consider material. Nor is it now important how the paper filed by appellees June 23, 1875, considered as a pleading, was disposed of, as the only questions necessary to be determined are presented by the exception contained in it and the paper filed October 9th.

The questions thus presented are—

1. Whether the court erred in setting aside the order of confirmation made June 24th, 1870, and again approving and confirming the report of sale.

2. Whether the right of appellees to redeem the property terminated at the end of three years from June 24, 1870, or continues three years from the date of the judgment appealed from.

The judgment enforcing McAtee's lien having been rendered more than five years before appellees appeared in court and moved to have the action re-tried, cannot be now vacated or set aside. But appellees having given security for costs and been admitted to make defense before the expiration of five years from the order of June 24, 1870 (section 445, Myers' Code), required the issue as to the confirmation of the report of sale to be re-tried as to them as if there had been no order of confirmation, and upon the re-trial the court had the power to confirm that order, or modify or set it aside.

And every defense or objection they could have made to the motion to confirm the report of sale before it was done, as well as every motion they might have made to modify or set aside the order of confirmation after it was entered, if they had been present by actual service of summons, they had the right to make upon the re-trial.

There does not appear sufficient grounds for rejecting the report of sale, and the order of June 24, 1870, so far as it approved and confirmed that sale, was proper and valid, and the court erred in setting it aside. But section 5, article 7, of the act of 1851, before referred to, requires that "the court confirming any sale made under such decree shall direct that the property be redeemable at any time within three years by the owner on paying the principal sum, and interest at the rate of ten per cent. per annum, and all taxes and levies made subsequent to the sale thereof, and if not redeemed within the time specified, that the sale shall be

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final; and after the time for redeeming shall have expired, the court shall cause a conveyance to be made to the purchaser by a commissioner."

By the order of June 24, 1870, the sale to Barbee was approved and confirmed absolutely without a reservation of the right given by the act to appellees to redeem, and the commissioner of court was directed to execute to him a deed for the property, while he was left in possession of the property that he had held for years under the previous void order of confirmation, and to which he had no right until the expiration of three years from the date of the order.

By section 800, Myers' Code, the court had the power at any time within sixty days from the date of that order, and if appellees had within that period appeared in court and moved therefor, it would have been the duty of the court to have so modified it as to reserve to them by the terms of the order the right to redeem within three years, to have set aside so much of it as directed the deed to be made to the purchaser before the end of that period, and to have so amended it as to require him to deliver the possession of the property to be held by them while their right to redeem existed. Upon the new trial provided for by section 145, the court had the power, and in our opinion it was its duty, to ascertain and secure in the judgment appealed from, as was done, those rights of appellees which were either denied or omitted to be reserved to them by the order of June 24, 1870. Consequently, the error of the court in setting aside instead of modifying that order does not affect the substantial rights of the parties.

2. It is contended by appellants that the right to redeem being recognized and provided for in the judgment directing the property to be sold, it was not essential the right should

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in express terms have been reserved in the order of confirmation. A sufficient answer to that position is, that the statute under which the proceedings were had expressly required the court confirming the sale to direct that the property be redeemable within three years, and also provided that no deed could be made to the purchaser until the end of that period.

The effect of the order of June 24, 1870, as it stood, was to divest appellees of the title and possession as well as the right to redeem. For neither was the right reserved or the terms prescribed upon which it might be exercised, nor was any provision made to reinvest them with the title or possession in case they redeemed the property. It therefore follows that the limitation of three years did not begin to run against them until the judgment appealed from was rendered.

As the act of 1851 requires the owners of property sold in such cases as this to repay to the purchaser only taxes or levies made subsequent to the sale, the court had no right to require appellees, as a condition of the right to redeem; to pay those which may have been made previous to the sale.

Wherefore, the judgment of the court below is affirmed.

To a petition for rehearing—

CHIEF JUSTICE LEWIS DELIVERED THE FOLLOWING RESPONSE:

By the fifth section, seventh article, of the statute under which the property of appellees was sold, it was made the duty of the court *confirming*, not the court decreeing, a sale of it to reserve in the order of confirmation their right to redeem at any time within three years from the date thereof, and to also prescribe the terms upon which they might ex-

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ercise that right. But the order of confirmation made June 24, 1870, contained neither a reservation or recognition of the right, but was made absolute and unconditional.

- ▲ By the same section it is provided that the court shall not cause a conveyance of the property to be made to the purchaser until the time for redeeming has expired. But the court, in the same order, directed the commissioner to then execute a deed to the purchaser, Barbee.

Barbee had no right to the possession of the property until the expiration of three years from the date of the order of confirmation, and then only upon the failure of appellees to redeem. But he held the possession from 1857 until 1879, when the judgment now appealed from was rendered, undisturbed by the order of June 24, 1870.

So that if, after the expiration of sixty days from the date of that order, when under section 800, Myers' Code, the power of the court to vacate or modify it ceased, appellees had offered to redeem the property, they would have found appellant Barbee in possession, claiming under a deed made in pursuance of an order that the court was then without the power to set aside, and their right to redeem ignored, if not adjudged to have terminated.

There is no other way to account for such palpable violation of the statute, except upon the idea that the court, when the order of June 24 was made, was of the opinion that the right of appellees to redeem had expired at the end of three years from the date of the sale made in 1857, and did not then exist at all; and it is difficult to avoid that conclusion if, as counsel for appellant contends, the reservation of the right to redeem made in the judgment for the sale of the property is to be considered as a substantial and sufficient compliance with the statute.

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The legal effect of the order of June 24 was to make the right of appellees to redeem questionable, if it was not conclusive against them, and to compel them, though willing and able to redeem, to resort to proceedings not required by the letter or spirit of the statute in order to recover of appellant possession of their property, and to divest him of the title which the court had prematurely and improperly caused to be conveyed to him.

The limitation of three years, therefore, did not begin to run until the judgment appealed from was rendered, when, for the first time, the right to redeem was recognized, and the free and unobstructed exercise of that right provided for in the manner required by the statute.

The petition for rehearing is overruled.

CASE 124—EQUITY—DECEMBER 13, 1881.

**Farmers and Drovers' Insurance Company v.
German Insurance Company, &c.**

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. A mortgagor, by fraudulently concealing material facts, induces a mortgagee with a prior lien to release it and take a new mortgage, the latter believing that the property is unencumbered, and resulting in giving another mortgagee priority.
2. Equity will restore the party defrauded to the benefit of his prior lien.

BEATTIE & WINCHESTER FOR APPELLANT.

1. Appellee being simply a volunteer, claiming the benefit of appellant's release, and seeking to profit by his acts, occupies no better position than Doern would, if he were living, or than his privies in estate do since his death.

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2. Appellant is entitled to relief both upon the ground of fraud and mistake. (1 Barb. N. Y., 397; 10 Ho. Lords Cas., 90; 2 Lead. Cas. Eq., 569; Beard v. Campbell, 2 Mar., 127; Taylor v. Bradshaw, 6 Mon., 149; 5 Dana, 196; Snell's Eq., 448; Jones on Mortgages, 458; Gere v. Cushing, 5 Bush, 304; Snyder v. Hill, 2 Dana; Halbert v. McCulloch, 3 Met., 457; Pr. Dec., 158; Hardin, 53; Kennedy v. Johnson, 2 Bibb, 13; Carr v. Callahan, 3 Litt., 375; 2 Mon., 222; 3 Dana, 284; Breckinridge v. Moor, 3 B. Mon., 635; Davis v. Morgan, 1 Dana, 20; 1 Mar., 436; 1 Mon., 216; Faris v. Lewis, 2 B. Mon.; 3 *Ib.*, 420; 3 J. J. Mar., 708; 9 N. Y., 183; 5 Heyw., 243; 1 Day, 107; 13 Johns., 325; 1 Green's Ch'y, 366; 7 Bush, 447; 2 Sweeny N. Y., 218; 37 Iowa, 337; 23 *Ib.*, 500; 3 McLean, 625; 26 N. J. Eq., 417; 3 Allen Mass., 518; 2 Lead. Cas. Eq., 418; Snell's Eq., 438; Juris, 167; 9 Vesey, 275; 3 B. Mon., 514; 4 B. Mon., 190; 1 Met., 153; 2 *Ib.*, 228; 1 Bush, 383; Story's Eq. Juris., 110; 20 N. J. Eq., 39; 15 N. H., 56; Wolf v. Bale, 9 B. Mon., 210; 5 J. J. Mar., 101; 6 Mon., 23; Bridge Co. v. Douglass, 12 Bush, 701; 14 *Ib.*, 788.)

A. P. HUMPHREY FOR APPELLEES.

1. If appellant can be said to have acted in ignorance of appellees' rights, it must be in the face of the well recognized doctrine of constructive notice arising from the recording of appellees' mortgage.
2. Whatever Doern may have said or left unsaid, appellees cannot thereby be divested of any right. (13 Cal., 512; 34 Wis., 643; 14 Ills., 286; 1 Green's Ch'y, 145; 4 Johns. Ch'y, 568.)

CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

In May, 1874, George P. Doern gave to appellant his promissory note for \$2,500, bearing interest at the rate of nine per cent. per annum from date, and at the same time to secure its payment he and his wife executed a mortgage on certain real property on Green street, in the city of Louisville, which was in June, 1874, duly recorded.

July 24, 1876, Doern and one Stein gave their two joint promissory notes to appellee for \$17,000 each, due three years after date, and bearing interest at the rate of nine per cent. per annum from date; and to secure the payment thereof they and their wives, on the same day, executed a mortgage to appellee upon several lots of land belonging to

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them respectively, one of which lots, the property of Doern, was the same previously mortgaged to appellant.

May 1, 1878, Doern gave to appellant a new note for \$1,000, which was the balance of the first note after deducting payments made, and on the same day, to secure its payment, he and his wife executed a mortgage upon the Green street property previously mortgaged. The last mortgage was acknowledged June 19, 1878, and on the next day appellant, by its president, made an entry upon the margin of the record book releasing the lien retained in the first mortgage.

This action was brought by appellee to recover judgment for the balance due of the two notes given by Doern and Stein, and to enforce its lien upon the mortgaged property, including the lot mortgaged to appellant. The executor, widow, and heirs-at-law of George P. Doern, who died November 12, 1878, and appellant, were made parties defendants to the action, and appellant was called on to set up any claim he might have to the property.

Appellant filed its answer, made a counter-claim against appellee, and cross-petition against the executor, widow, and heirs-at-law of George P. Doern, deceased, and in it alleged, in addition to the facts already mentioned, substantially, that after the first note given to appellant fell due Doern, though repeatedly requested to pay or renew it, evaded doing either until about the first of May, 1878, when the note for \$1,000, which bore six per cent interest, and the second mortgage, were executed; that appellant, confiding in the integrity and good faith of Doern, made no examination of the record for mortgages upon the property, but released the first mortgage and accepted the second under a mistake of fact, and by reason of the fraudulent

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failure of said Doern to disclose the existence of appellees' mortgage, of which he was aware appellant, its officers and agents, were, at the time, ignorant; that the estate of said Doern was, when the second mortgage was executed, and is now, insolvent, and that as soon as the existence of appellees' mortgage was discovered appellant caused it to be notified of the mistake, and that appellant would insist upon its priority of lien. In its answer appellant prayed for judgment for its debt, the correction of the alleged mistake, the cancelment of the release, and enforcement of the first mortgage.

The court below having sustained the demurrer to the counter-claim filed by appellant and dismissed it, this appeal is prosecuted, and for the purposes of the demurrer the allegations of appellant must be taken as true. Appellant seeks relief upon the grounds of both mistake and fraud.

The first question to be considered is, whether appellee, not having either participated in the alleged fraud, or been connected with the transaction in which the mistake on the part of appellant occurred, ought to be deprived of the advantage thus acquired by it, in order to afford relief to appellant. The determination of that question depends upon how appellee obtained the advantage it now seeks to avail itself of, and whether its attitude in this case is such as to invoke the aid or protection of a court of equity.

The maxim, "the laws assist those who are vigilant—not those who sleep upon their rights," does not, as urged by counsel, apply to this case; for the apparent advantage appellee may have is the result not of its vigilance, but mistake of appellant and fraud alleged to have been committed against it.

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It is not sufficient that appellee be innocent of the alleged fraud, and disconnected with the transaction in which the mistake occurred in order to profit by the misfortune of appellant. If it "has not loaned any money, or done any act on the faith or strength of the release of the first mortgage, . . . has not given up any security, divested itself of any right, or placed itself in a worse condition than it would have been" but for the release by appellant, it is not wronged or injured, and therefore not entitled to any remedy in this case.

It is needless to refer to all the cases cited by counsel, for if appellant is entitled to relief as against Doern, upon the ground of fraud or mistake, particularly the former, it is difficult to conceive upon what principle of reason, justice, or policy appellee may interpose to prevent it. In the case of *Barnes v. Cammack*, 1 Barbour, 398, which is similar to this, the court used the following language: "Brown not having parted with any property or right, nor placed himself in any worse condition in consequence of plaintiff having canceled her first mortgage, but having acquired a superior title by reason of her mistake, this court cannot permit him to retain it to the injury of the plaintiff, but must give preference to the equity of the latter. . . . The principle upon which this case is decided, and which runs through all cases of this description, is, that when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons."

In this case the legal rights of appellant have been changed not merely by mistake, but also by fraud. Relief therefore is sought; and as it can be afforded to appel-

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lant without interfering with any right acquired by appellee, upon the faith of the changed condition, and without doing it any injustice, the attitude of appellee is that of a mere volunteer in the issue which is really between appellant and the executor, widow, and heirs of Doern. And as they have not denied the allegations made by appellant, they must be taken as confessed by them. Therefore, the only question remaining that it is necessary to decide is, whether the allegations are sufficient to sustain appellant's cause of action against them, and authorize the relief sought by it.

The allegations relevant to this issue are, that at the time of the release of the first mortgage appellant and its officers were ignorant of the existence of appellee's mortgage, of which Doern was aware, and did not examine the records, because of the confidence reposed in him, of which fact he was also aware, and that the release was made by a mistake, and because Doern fraudulently concealed what it was his duty to disclose.

Though mortgagees are bound to examine the record in regard to titles to real property, and in the absence of representations made in respect thereto by the mortgagor, must be presumed to have done so, yet they may rely upon such representations, and if so relying, act under a mistake of fact, they will be relieved of the consequences of such mistake, and if the representations are fraudulently made, the consequences should fall upon him who makes them.

In this case, though no representations are alleged to have been made by Doern, it is alleged that appellant and its officers acted upon the belief that the property was at the time of the release unencumbered by other mortgages, and that such belief was induced by the conduct of Doern, and knowing such to be the case, he fraudulently concealed the exist-

Bowling v. Commonwealth.

ence of appellee's mortgage, whereby appellant was injured, and he was benefited, at least to the extent of the difference between the rate of interest of the first and second notes.

In an opinion, therefore, as the record stands, appellant is entitled to the relief sought.

Wherefore, the judgment of the court below is reversed, and the cause remanded, with directions to overrule the demurrer to the counter-claim, and for other proceedings consistent with this opinion.

CASE 125—INDICTMENT—DECEMBER 17, 1881.

Bowling v. Commonwealth.

APPEAL FROM CLAY CIRCUIT COURT.

A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and if a conspiracy is charged, the statements of one of the conspirators cannot be used against another, unless there is some evidence of the conspiracy other than that of the accomplice.

JNO. & J. W. RODMAN FOR APPELLANT.

1. A conviction cannot be had upon the uncorroborated testimony of an accomplice. (Crim. Code, sec. 241.)
2. The court erred in admitting testimony, and appellant can take advantage of this error, although not made a ground for a new trial. (Johnson v. Commonwealth, 9 Bush, 228; Turnbull v. Commonwealth, 79 Ky., 495.)

P. W. HARDIN, ATTORNEY GENERAL, FOR APPELLEE.

1. The conspiracy having been proved, the statement of a co-conspirator was competent against appellant.
2. As appellant had the benefit of an instruction to the effect that the uncorroborated testimony of an accomplice is insufficient to convict, he cannot complain.

Bowling v. Commonwealth.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

In the year 1873 the house of Solomon Garland was broken into and robbed.

The robbers went to the house late in the night, after all the inmates had retired, and with a rail broke open the door, entered, and carried away a wooden box that contained three small boxes, in which Garland had deposited \$204.25.

Three tracks were found next morning which led from the house to a spot in a field near by, where the boxes were broken open, rifled, and left.

In a few days several persons were arrested and tried for the robbery, but no sufficient evidence being produced they were discharged.

For five years nothing further seems to have been done to discover the perpetrators of the offense, when for the first time one Jackson Archer, having become very bitter in feelings against Russell and Joseph Bowling, accused them of the robbery.

They were both indicted and tried at the same term of court. Joseph was convicted, and Russell Bowling was acquitted; yet this record shows such a state of facts as proves that neither or both were guilty.

Upon the trial of the appellant Joseph Bowling, the only evidence tending to connect him with the conspiracy and robbery charged in the indictment was that of Archer, who admitted facts sufficient to show that he was an accomplice in the commission of the offense.

It is true he swears he was innocent, but the facts contradict him, and his evidence is inconsistent, and fails to sustain his protestation.

His testimony confirms the wisdom of the legislature in providing that—

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"A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with *the commission* of the offense, and the corroboration is not sufficient if it merely show that the offense was committed, and the circumstances thereof." (Section 241, Criminal Code.)

Several witnesses were permitted to testify, against appellant's objections, to the statements of Russell Bowling, which were not made, if made at all, in the presence of the accused.

These alleged statements tended to prove a conspiracy to commit the robbery, and to involve the appellant as a participant in the conspiracy.

It is clear, under the section of the Code quoted, that the uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of a crime or of any of its constituent elements, or to render admissible any confessions or admissions of the parties which depend upon and must be preceded by evidence of a conspiracy, unless other evidence, besides that of the accomplice, is produced, tending to prove a conspiracy, and connect the accused therewith; and evidence merely showing that the offense was committed, and the circumstances thereof, is as insufficient for that purpose as it would be to connect the accused with the commission of the offense itself.

Before admitting the evidence of the alleged statements of Russell Bowling, not made in the presence and acquiesced in by the appellant, there should have been other evidence tending to prove a conspiracy, and connect the appellant with it, than that of Archer, the accomplice.

Wherefore, the judgment is reversed, and cause remanded, with directions to grant appellant a new trial.

Flood, &c., v. Pragoff, &c.

CASE 126—ORDINARY—NOVEMBER 21, 1881.

Flood, &c., v. Pragoff, &c.

APPEAL FROM LOUISVILLE CHANCERY COURT.

1. The attestation of the subscribing witnesses to a will is to the genuineness of the testator's signature, and not as to the contents of the paper. It is not necessary that they should know that the paper is a will.
2. When a paper is presented for probate, and it appears upon its face to be a will or codicil in regular form, without marks of alteration or other suspicious indications, the presumption is that the writing was on it when it was signed, and the testator knew its contents. The burden of proof is upon the contestants to show fraud, incapacity, or undue influence.
3. The date of the execution of a will or codicil may be shown by the writing itself or by extraneous proof. The statute requiring that the signature of the testator be placed at the "end or close thereof" is complied with, although it precedes the date.
4. The object of the exceptions to the rule admitting parties in interest to testify is to place both the parties upon an equal footing. In a contest as to the probate of a will, a devisee is a competent witness as to transactions between himself and the testator, all the claimants under the will being entitled to the same privilege.
5. The instructions objected to are error; but as they neutralize each other, they do not prejudice appellants.

E. E. MCKAY, LANE & HARRISON, AND W. LINDSAY, FOR APPELLANTS.

1. A subscription means a writing and a signature at its end. Both must be proved to comply with the statutory term "subscription."
2. The paper in contest being a codicil purporting to affect other wills, its date was of the essence of the paper.
3. It was error to admit Pragoff to testify against infants.
4. The proof offered by the propounders was insufficient to authorize the probate.
5. Instruction "C" should not have been given. It is in contradiction of the instruction number three given on appellant's motion. (Gen. Stat., 832, sec. 5; *Ib.*, 247, sec. 26, chap. 21; 1 Duv., 126; Jones v. Jones, 1 Met., 268; Griffith v. Griffith, 5 B. M., 573; 3 Am. Law Reg., O. S., 537; 1 Law Rep., 64; 30 Law of Prop., 55; 32 *Ib.*, 200; Jar. on Wills, 251; 6 Penn. St. Rep., 409; 2 Brad. N. Y., 244; 13 Jurist, 289; 3 Curtis, 754; 1 *Ib.*, 513; Beall v. Cunningham, 3 B. Mon., 338; Alexander v. Waller, 6 Bush, 341; Civil Code, sec. 606; Armstrong v. Armstrong, 14 B. M., 338; 24 Georgia, 328; 6 Eades'

2r	607
4r	331
5r	108
79	607
90	36
79	607
1101	73
79	607
111	244
111	246
79	607
118	518
79	607
118	524
79	607
118	524
79	607
119	893
119	898
79	607
121	591
122	205
79	607
1136	570

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Rep., 417; 2 Graves' Ch'y Rep., 549; 2 Redfield on Wills, 220; 1 B. Mon., 117; Upchurch v. Upchurch, 16 B. Mon., 112; 5 B. M., 511; 2 Wharton on Evidence, 888; 4 Met., 167; 26 Barb., 253; 23 N. Y., 394; Broadbudd v. Broadbudd, 9 Bush; 1 Duv., 131.)

GOODLOE, ROBERTS & HUMPHREY AND BARRET & BROWN
FOR APPELLEES.

1. It is not necessary that a testator should acquaint the witnesses to a will or codicil with the fact of the contents thereof.
2. A will is sufficiently signed and executed without a date as with it.
3. Pragoff was a competent witness.
4. There was no error in the instructions for appellees. (7 Bingham, 457; 6 *Ib.*, 311; 1 Crompt. & Meeson, 140; 1 Bac. Ab., 502; 10 Met., (Mass.), 166; 11 Cushing, 532; 16 Gray, 93; 34 Ind., 375; 36 *Ib.*, 136; Ray v. Walton, 2 Mar., 74; Swift v. Viley, 1 B. Mon., 117; Miles' Will, 4 Dana, 1; 27 La. Annual, 271; Soward v. Soward, 1 Duv., 127; Jones v. Jones, 3 Met., 269; Bigelow on Fraud, 270, 127, 122; 10 Bush, 299; Wharton on Evidence, sec. 482.)

JUDGE HINES DELIVERED THE OPINION OF THE COURT.

Richard J. Usher, in 1873, executed a will, dividing his property between the parties to this action, none of whom are related to him, and in 1877 he executed a codicil revoking all devises to appellants, and died within about two years thereafter. The will was admitted to probate without objection, but the probate of the codicil was opposed by appellants on the ground of incapacity and undue influence, and from a verdict and judgment against them they appeal.

The codicil reads as follows:

"I, Richard J. Usher, of Louisville, Ky., do make this my codicil, confirming my last will, and do hereby revoke all clauses in said will or previous codicil bequeathing or leaving any thing to Michael Flood, or any of his children or connections.

RICHARD J. USHER.

"GEORGE HOWARD,

"HENRY DEPPEN, JR.

"LOUISVILLE, Ky., April 3d, 1877."

The testimony of the subscribing witnesses, Howard and Deppen, is to the effect that they were called upon, in the office of Pragoff, one of the devisees, to witness the signature of Richard J. Usher to the paper offered as a codicil, and that each of them, at the request of Usher, signed the paper in his presence, and in the presence of Pragoff, Usher having signed his name in their presence previous thereto, and that neither of the deponents saw any writing above the signature of Usher, and that they did not know what preceded the signature, whether it was a will or not, because they say that whatever writing, if any, there may have been, was concealed by the paper being folded down over it, or by reason of its being concealed by a blotter. The subscribing witnesses further state that Usher was of sound mind at the time they subscribed the will. The testimony of Pragoff is that he wrote the codicil at the request of Usher, and that the paper presented is the one signed in his presence by Usher and the attesting witnesses, and was by the witness, after execution, handed to the testator.

Upon the record the following inquiries arise, the consideration of which will sufficiently indicate the objections of counsel for appellants to the ruling of the court below:

First. Is it necessary for a testator to acquaint the witnesses to his will or codicil with the fact that it is a will or codicil?

Second. What is a sufficient signing of a will?

Third. Who are competent to testify on an application to probate a will?

Fourth. Are the instructions given a correct exposition of the law?

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In reference to the first and second inquiries, it is proper to consider the following provisions of the General Statutes:

"No will shall be valid unless it is in writing, with the name of the testator *subscribed thereto by himself, or by some other person in his presence, and by his direction*; and moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator." (Sec. 5, chap. 113.)

"When the law requires any writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature be subscribed at the end or close of such writing." (Sec. 26, chap 21.)

As to the attestation, the statute appears to have been literally complied with, but it is contended for appellants that a literal compliance is not enough; that there arises, by necessary implication from the language used, a further requisite to a valid execution, and that is that the subscribing witnesses must know that they are subscribing the will of the person whose signature they attest, or they must be informed by him that it is his will which they subscribe. This, we think, is not required. The legislature has prescribed such formalities as it deemed proper, and we ought not to add to these formalities by construction, especially when the efficacy of the constructive requirement depends solely upon the memory of the subscribing witness. After any considerable lapse of time, the witness who could remember the circumstances connected with his subscription to the paper, so as to be able to state that the person, whose signature he was called to attest, declared that the paper signed was a will, might justly be subjected to the

suspicion of fabrication, one of the principal things against which the formalities specifically prescribed were designed to guard. It would be as reasonable to suppose that the legislature intended to require that the subscribing witness should know that the paper was a will by reading it or by having it read to him, something that this court has repeatedly held not essential. (Higdon's Will, 6 J. J. M., 445.)

These rulings show the understanding of the court to be that the attestation is of the genuineness of the signature of the testator, and not of the contents of the paper. If, then, the witness is not required to know the contents of the paper, which could only be known to him by such inspection, what beneficial end is attained by requiring him to state that the testator declared the writing to be his will, or that the signature attested is to his will? But it is insisted that the paper may have been blank, and the writing above the signature thereafter made, in which case there would not be a compliance with the requirements of the statute. Such might be the case as well when the declaration is made that the paper contains a will as when there was no such declaration; for it is not to be supposed that the paper was blank, for in that case the signing would be meaningless, unless the person whose signature is attested contemplates a fraud, which could as well be accomplished by a declaration that there was writing on the paper above the signature, and that the writing was a will. The person making the paper being of sound mind, it is not to be presumed that he is doing a vain or foolish thing in requiring the attestation, or that he contemplates a fraud, so that when the paper is presented for probate, and it appears upon its face to be a will or codicil in regular form, without any marks of alteration or other suspicious indications, the presumption

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is that the writing was on the paper when signed, and that the testator knew its contents. In such case the burthen is on the contestants to show fraud, incapacity, or undue influence. In fact, it is not ordinarily necessary that the propounders should show, as they did by the attesting witnesses, that the testator was of sound mind, provided the statutory requirements were complied with, and there is nothing in the paper when presented which is irrational or inconsistent. Then the burthen shifts to the contestants. (Milton v. Hunter. 13 Bush, 163.)

It is insisted, however, that the presumption of capacity and volition in the execution of the paper is destroyed by the fact that it appears to have been written by one who derives a benefit from its provisions. Conceding this to be the correct rule, its only effect was to require the propounders to show volition and capacity, which was sufficiently done. (Bigelow on Fraud, page 127.)

As to whether the subscribing witness must know that the paper signed by him is a will, or whether it must be so declared to be by the testator, has never arisen in this State; but in other States and under similar statutes it has been held that neither is necessary, and that it is not required that the witnesses should see any writing on the paper.

In the case of Osborne v. Cook, 11 Cushing, 532, when the testator did not declare the paper to be a will, and neither of the attesting witnesses knew or suspected the nature of the instrument, the attestation was held sufficient. (Ela, &c., v. Edwards, 16 Gray, 92.) It is true that in these cases the wills admitted to probate were olographic; but this fact was referred to in the opinions for the purpose only of showing that the testator knew that he was making

a will, a fact that is satisfactorily shown in this case by other evidence.

In the case of *Brown v. McAlister*, 34 Indiana, 375, the will was written by another than the testatrix, and while the paper was so folded as to conceal the writing, the witnesses, at the request of the testatrix, subscribed their names without knowing the character of the writing, and there was no declaration by the testatrix or any one else as to whether there was any writing on the paper other than the signature of the testatrix, and no statement as to the object in requesting the witnesses to attest the signature. It was held that the statutory requirements had been complied with.

Such also are the rulings of the English courts upon a statute essentially the same as the statute of this State, it having been held in one case at least that the attestation was good where the witness had been deceived, and led by the testator to believe that the writing subscribed was a deed, and in another where the writing was concealed. (Bacon's Abridgment, vol. 10, pages 494 and 502, title Wills and Testaments; 7 Bingham, 457, *Wright v. Wright*.)

In our opinion it is not necessary, under the facts of this case, that the subscribing witnesses should have been told that the paper signed was a will, or that they should know the character of the paper, or in fact that there was any writing, other than the signatures, on the paper at the time they subscribed it.

As to the second question suggested, it is insisted by appellants' counsel that as the words and figures "Louisville, Ky., April 3d, 1877," follow the signatures of the testator and of the witnesses, the paper was not signed at the "end or close thereof," as required by the statute.

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This position is untenable. Neither the date nor the name of the place of making the will is, in this case, a part of the will. The date to a will or codicil is immaterial in all cases. It may be established by oral evidence in contradiction to the written date embodied in the writing. While it is conceded by counsel that ordinarily the date is immaterial, it is insisted that the circumstance that the testator had made several wills during his life-time constituted this an exception to the rule, as it is important that the codicil appear to have been written subsequent to the will probated in order to affect it. This does not appear to us to be an exception to the rule that the date is not an essential part of the will; but the fact that several wills were made rendered it proper that it should be established in some way that the codicil was executed subsequent to the will admitted to probate, which was done by one of the witnesses, who states that he subscribed the codicil some time in the year 1877, while the will admitted to probate was executed in 1873. The circumstances of each case must determine the importance of the date of execution of a will or codicil, and when it becomes the duty of the propounders to fix the date of execution, it may be done in the same way that the time of any other transaction is established—by the writing itself, or by extraneous proof.

On the third point suggested, it is insisted that the court erred in permitting Pragoff, one of the devisees, to state that after the execution of the codicil he handed it to the testator, and that as some of the contestants were infants under fourteen years of age, and the statement of the witness was "concerning an act done by, and a transaction with, the decedent," it was in violation of the provisions of section 606 of the Civil Code.

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Section 605 of the Code provides that every person, subject to the modifications contained in section 606, shall be competent to testify for himself or another. Subsection 2 of section 606 reads:

"No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statement, or was present when such transaction took place, or when such act was done or omitted."

We think the evidence offered was competent, the object of the statute evidently being to remove the common law ground of incompetency on account of interest, and the exceptions contained in the statute being introduced to secure equality, as said by this court in *Hardin's adm'r v. Taylor*, 78 Ky., 596. Any other construction would operate in a contest on the probate of a will to exclude the evidence of one interested as to any statement made by the testator in the absence of one having or claiming a conflicting interest, or when the person having or claiming such interest is under fourteen years of age. Such a result was clearly not contemplated, and the manifest object being to remove all objection to competency on the ground of interest and to secure equality, any exception insisted upon under the statute ought to be made to clearly appear, and ought not to be established by a doubtful or strained construction. Similar statutes in other states have been so construed, and, as said in *Wharton on Evidence*, section 464, they are remedial, and their operation will not

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be limited by a technical closeness of construction. The exception is properly applied when the person offering to testify is seeking to establish against the decedent a liability to himself, and through the claim thus established to reach the estate. In such cases there is no equality. There is no mutuality, and there ought not, therefore, to be any admissibility; one litigant being silenced by death, the other ought to be silenced by law. (Wharton on Evidence, sec. 466.) But in cases like the one under consideration there is no such inequality. The several claimants of the estate are on an equal footing, and there is perfect mutuality and equality so far as opportunity and the right to testify is concerned; and that such opportunity and right is sought by the statute is manifest from other provisions. For instance, by subdivision c of subsection 2, it is provided that the witness may testify for himself when the decedent, his representative, or some one interested in the estate, shall have testified against the witness in reference to any statement by, or transaction with, the decedent; and subsection 3 provides that no one shall testify against one who is before the court by constructive process only.

As to the fourth point, it is objected that the court below erred in giving instruction "C," because it is in conflict with instruction number three, which was given at the instance of appellants, and which they claim embodies the law.

Instruction "C" is as follows:

"If the jury believe from the evidence that R. J. Usher signed the paper 'B' (the codicil), this is *prima facie* evidence that he knew its contents before such signing."

Instruction number three referred to is as follows:

"That from the signing of a last will and testament by a testator, the presumption ordinarily is that he knew its

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contents; but in the case at bar, if the jury believe from the evidence that the paper marked 'B,' except signatures thereto attached, was written by Wm. Francis Pragoff, and that he and his children were devisees and took benefits under said paper, then this presumption is repelled, and unless they find from additional evidence that said paper 'B' expressed the intentions of said Usher, or that he knew its contents, they should find said paper not to be any part of the will of said Richard J. Usher, deceased."

Without stopping to inquire whether these instructions, or either of them, even abstractly present the law correctly, it is enough to say that neither should have been given; but as they neutralize each other, and do not appear to have been prejudicial to appellants, we will not reverse for this error. These instructions ought not to have been given, because they give undue prominence to certain portions of the evidence, when the whole of it should have been left to be considered and weighed by the jury, without an intimation from the court as to the weight they should give any particular portion of it. Contested will cases are to be tried as any other case in which there is an issue of fact for the jury. The court must pass upon the admissibility of the evidence offered, but when it goes to the jury, they are the sole judges as to the weight they will give it. (Stokes' ex'r v. Shippen, &c., 13 Bush, 183.)

Judgment affirmed.

Commonwealth v. Simonds.

CASE 127—INDICTMENT—NOVEMBER 26, 1881.

Commonwealth v. Simonds.

APPEAL FROM FAYETTE CIRCUIT COURT.

The machine known as "French pool" or "Paris mutual," used in betting on horse-racing, is a "contrivance used in betting" within the meaning of section 6, article 1, chapter 47, General Statutes.

C. J. BRONSTON FOR APPELLANT.

The contrivance used in selling "French pools" or "Paris mutuals" comes within the language and spirit of section 6, article 1, chapter 47, General Statutes. Any character of contrivance or device which involves chance or speculation as a source of gain deserves the penalty of the statute. (Smith, &c., v. Commonwealth, MS. Op., September 15, 1881; Ritte v. Commonwealth, 18 B. M., 38; Commonwealth v. Burns, 4 J. J. M., 177; Tallett v. Thomas, Law R. Q. B., 514-521.)

FRANK WATERS FOR APPELLEE.

The machines or contrivances intended to be embraced by the statute are faro-banks, gaming-tables, or machines in themselves games of chance, and where the winning or losing of bets is determined by the machine itself. The contrivance set up by appellee does not fall within that description, and therefore does not deserve the penalty of the statute. (Wilson v. Conlin, Appellate Court, Second Dist. Illinois, 1879; Applegarth v. Colley, 10 Mees. & Wels., 723; Smith on Contracts, 245; Bishop on Statutory Crimes, secs. 846, 862, 872-3; West v. Commonwealth, 3 J. J. Mar., 641; United States v. Milburn, 4 Cr. C. C., 719; Harless v. United States, 1 Morris, 169; State v. Hayden, 31 Mo., 35; State v. Rorie, 23 Ark., 726; Commonwealth v. Shelton, 8 Gratt., 592; Gen. Stats., chap. 47, art. 1, secs. 1, 6, 11, and 19; Cheek v. Commonwealth, 79 Ky., 359.)

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

The appellee was indicted for the offense of setting up, exhibiting, and keeping a contrivance used in betting, commonly known as "French pool."

It is not disputed that the accused set up, exhibited, and used the contrivance known as "French pool," and that tickets representing money were bought from, and registered by him on or by means of the "contrivance."

79	618
92	573
79	618
116	846
116	846

79	618
116	846
116	846

79	618
125	745

79	618
136	182

And the only question in this case for our decision is, does the sixth section of article I, chapter 47, General Statutes, embrace the contrivance known as "French pool?"

That part of the section applicable to the question reads:

"Whoever shall set up, exhibit, or keep for himself or another, or shall procure to be set up, exhibited, or kept; *any faro-bank, gaming-table, machine, or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won or lost*, shall be fined," &c.

"French pool," also called "Paris mutual," is described to be a small *machine*, containing the name of each horse to be run in a particular race written or printed on the side, and printed numbers placed on the inside of the machine, which could be seen through holes in it. It is used by the owner or person operating it, and by those engaged in betting on horse-racing in this way:

The owner or operator sells the tickets for five dollars each; they bear numbers corresponding with the number given the horse on the machine, and by turning a crank or screw attached to the machine the betters are shown at once the number of tickets sold on each horse as each of said tickets is sold, so as to enable him to bet more intelligently and safely, and lessen the chances of disaster to himself.

After the race is over, the machine is examined to see how many tickets have been sold, and those persons holding tickets on the winning horse get the amount of all the money received by the operator for all the tickets sold by him on all the horses that have run in the particular race, less five per cent. commission on the pool, which the operator of the machine retains for his services.

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It is true, the operator or owner of the machine, by receiving five per cent. certain, without regard to the issue of the race, is not guilty of gaming or betting, in a technical sense, because he hazards nothing; but the ticket-buyers are engaged in unlawful betting, whereby they either win the money of other ticket-buyers or lose their own, and the machine is used by the ticket-buyers in betting, and the operator or owner of the machine sets it up, exhibits, and uses it for the ticket-buyers, and to aid them in unlawful betting, whereby they win money or lose money, and we are therefore of the opinion that the evidence shows in this case that the accused set up, exhibited, and used the machine known as "French pool;" that it is a contrivance used in betting, by which betting money or other thing is or may be won or lost, and it is within the description of the statute.

This same "contrivance" was introduced into England a few years since, and it was declared to be an instrument of wagering, and that the wagering by purchase of tickets on a horse-race was a wagering on a game of chance within the statute of 32 Victoria, chapter 52, section 3, which punishes as rogues and vagabonds those who play or bet at or with such a contrivance or instrument in a public place. (*Tallett v. Thomas*, Law R. Q. B., 514-521.)

The case of *Cheek v. Commonwealth*, lately decided by this court, simply decided that pool-selling was not a bet or game of chance, as the seller ran no risk, but that his act might be declared to be a public nuisance under a certain state of concurrent facts.

Wherefore, the judgment is reversed, and cause remanded, with directions to grant appellant a new trial, and for further proper proceedings.

Power of the Governor to fill Vacancies by Appointment.

CASE 128—JULY, 1881.

79 621
107 684**Opinion of the Judges of the Court of Appeals****ON THE SUBJECT OF THE POWER OF THE GOVERNOR
TO FILL VACANCIES BY APPOINTMENT.**

The Governor has no power to fill a vacancy in the office of a Judge of the Court of Appeals, unless the unexpired term shall be less than one year, in which case he may fill such vacancy by appointment.

JUDGE HARGIS DELIVERED THE OPINION OF THE COURT.

We have been requested by the Chief Executive of the commonwealth to expound the constitution relative to his power to fill temporarily by appointment a vacancy in the Court of Appeals, where the unexpired term shall be greater than one year.

In construing the sections of the present state constitution which confer upon the Governor the general power to fill vacancies, and to make appointments under specified contingencies, it must be borne in mind that the constitution is to be construed as a frame of government, and its interpretation result, if possible, in a consistent whole. And the pervading principles of the constitution which it superseded, pertaining to the nature and extent of the power of executive appointment, should be looked into and compared with the theory and spirit of the present instrument on that subject, as the dissimilitude will shed light upon its meaning, and lead to a better understanding of the intention of its framers.

The constitution of 1799 invested the Governor with the power to fill judicial offices by appointment; but the present constitution abrogated that system, and substituted therefor an elective judiciary.

Power of the Governor to fill Vacancies by Appointment

It is said in 3 Metcalfe, 211: "To curtail the power of *appointment* to office by the executive, and to extend the election principle, was one of the leading objects of the authors of the new constitution. This purpose was not more distinctly manifested in the expressions of public sentiment which led to the call of the convention than it has been in the provisions of the instrument itself. Almost all judicial and ministerial offices, as well as many of the executive offices, had been previously filled by appointment.

"The great object of the change in the system was to refer to the people the choice of their officers, of all grades and classes, whether state, district, county, city, or town offices."

The general elective principle manifested by this unsparing change in the organic law is significant, and supports with great force the denial of the power to fill vacancies by executive appointment, unless it be, in every case where it is claimed, shown to exist by some specific clause of the constitution, or through laws enacted in pursuance of, or not inconsistent with, its provisions, or where vacancies are not provided for either by the constitution or legislative enactment.

It is true, whenever a question is addressed *exclusively* to the executive judgment, neither of the other departments of the government can inhibit or control executive action upon such question, and this principle flows from the triune character of our government, by which its sovereignty is confided to distinct coördinate departments, whose officers shall exercise none but the powers of the department to which they belong, unless expressly directed or permitted to do so by the constitution.

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This is said to be "perhaps the most conservative provision in our organic law."

And section 9 of article 3 confers upon the Governor, who is the head of the executive department, the general power to fill vacancies, in this language :

"He shall have power to fill vacancies that may occur by granting commissions, which shall expire when such vacancies shall have been filled according to the provisions of this constitution."

The language of this section leaves but little room for interpretation.

Its literal meaning seems to be self-explaining, and would doubtless authorize appointments by the Governor to fill vacancies temporarily, in the absence of other provisions of the constitution, or laws passed in pursuance thereof, declaring that vacancies shall be filled in a different manner.

But it is a sound rule of construction that the whole instrument should be examined with a view of arriving at the true intention of each part.

And when we look at the constitution upon the subject of vacancies, it is clear that the power to fill vacancies temporarily under said section, which is not self-executing, was not conferred upon the Governor, to be exercised by him upon his knowledge of the existence of a vacancy, without further constitutional or statutory authority.

And it will not do to say that unless the power to fill vacancies temporarily belongs to the Governor in the literal and isolated sense of the section quoted, offices will be without incumbents for a time, and the framers of the constitution never intended such a result, because in the very nature of things such a result, to a greater or less extent, is bound

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to follow vacancies in any office under any constitution devised by man.

And the framers of our constitution did not rely upon this section alone to supply vacancies temporarily, as is clearly shown by other sections which either provide a different mode in filling them, or plainly negative the necessity therefor.

Section 7 of article 6 provides, that "vacancies in offices under this article shall be filled *until the next regular election* in such manner as the general assembly may provide."

That article concerns "executive and ministerial offices for counties and districts," and designates of those classes the office of commonwealth's attorney, circuit court clerk, county court clerk, county attorney, sheriff, surveyor, coroner, jailer, assessor, and constable, offices for towns and cities, and such county and district ministerial and executive offices as shall be created by the general assembly.

It is plain that the general assembly, and not the Governor, has the power to fill vacancies temporarily in all of those offices "*until the next regular election.*"

By section 35, article 4, the general assembly is directed to provide the mode of filling vacancies in the office of county judge and justice of the peace.

It is also *provided* in section 13, article 4, that when a vacancy shall occur, from any cause, in the office of Clerk of the Court of Appeals, the judges of that court shall have power to appoint a clerk *pro tem.* to perform the duties of the clerk until such vacancy shall be filled.

Section 26, article 8, provides for filling vacancies in state offices in this language: "When a vacancy shall happen in the office of Attorney General, Auditor of Public Accounts, Treasurer, Register of the Land Office, President of the

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Board of Internal Improvement, or Superintendent of Public Instruction, the Governor, in the recess of the Senate, *shall have power to fill the vacancy by granting commissions which shall expire at the end of the next session*, and shall fill the vacancy for the *balance* of the time by and with the advice and consent of the Senate."

Thus, by this section, power to fill the vacancy temporarily in those offices, and until the end of the next session of the Senate, is expressly conferred upon the Governor; yet if he had the power under section 9 of article 3 to fill all vacancies until they shall have been filled according to the provisions of the constitution, and its framers had so understood and intended the section, it was wholly unnecessary to confer upon him the power to fill the vacancies in those offices until they shall have been filled by and with the advice and consent of the Senate; and no provision of a solemn written constitution should be held to be purposeless, but each should be given effect, and the whole rendered uniform if practicable.

That the framers of the constitution believed they had invested the Governor with general power to fill vacancies temporarily, with the limitation we have suggested, is strongly evidenced by the fact that they either delegated the power to the general assembly or expressly provided in the constitution itself the manner of filling vacancies temporarily in all of the offices created by the constitution, except Lieutenant Governor, member of the general assembly, circuit judge, and appellate judge.

As to these, the necessity of filling the vacancies temporarily did not exist, nor did the vacancies demand more

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expeditious means of filling them than were adopted by the constitution.

Should a vacancy occur in the office of Lieutenant Governor during the recess of the senate, there could be no great necessity for filling the vacancy until the senate over which he presides by virtue of his office should assemble, unless he were acting, or should be called upon to act, as Governor; and in that event the constitution, section 20, article 3, makes it "the duty of the Secretary of State for the time being to convene the senate for the purpose of choosing a speaker." And this construction avoids the possibility of the Governor appointing his own successor.

Section 31, article 2, provides that "the general assembly shall regulate, by law, by whom and in what manner writs of election shall be issued to fill vacancies which may happen in either branch thereof."

And no one certainly would contend that the constitution conferred upon the Governor the power to fill vacancies temporarily in the office of senator or representative, or that it would ever become necessary to do so to constitute a quorum.

Before considering the sections of the constitution, which are in substance the same, relative to the mode of filling vacancies in the office of appellate or circuit judge, we will call attention to the contemporaneous and subsequent practical construction placed upon the provisions of the constitution above mentioned by the legislative department in putting them into operation.

They furnish a most reliable guide in the construction of the extent of the general power conferred upon the Governor to fill vacancies temporarily by section 9 of article 3.

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It is provided by section 7, article 6, chapter 33, General Statutes, title "Elections," that a vacancy in the office of Commonwealth's attorney or circuit court clerk shall be *temporarily* filled by the circuit judge until the next succeeding election.

Section 5, *ibid*, directs that a vacancy in the office of sheriff, coroner, surveyor, county court clerk, county attorney, jailer, constable, or assessor, shall be *temporarily* filled by the county court until the next succeeding August election.

Section 8 of the same article requires that a vacancy in the office of county judge shall be filled by the justices of the peace of the county until the next August election.

And even as to vacancies in the office of justice of the peace the legislature, in providing therefor, considered it necessary to the exercise of the power by the Governor to expressly invest him with authority to fill them temporarily until the next succeeding May or August election, and the executive department has uniformly complied with this provision of the law, thereby showing its recognition of the authority of the legislature to enact it.

While "contemporary construction can never abrogate the text, never fritter away its obvious sense, never narrow down its true limitations, and never enlarge its natural boundaries," the practical exposition of section 9, article 3, of the constitution, which the legislature has given by the many provisions for filling vacancies temporarily, sustains the construction of that section we have indicated with a plausibility and strength not easily destroyed.

But we are warned that legislative construction is neutralized by executive interpretation.

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The single instance, not to be dignified into a precedent, of the *ad interim* appointment of the late Judge Sampson to fill a vacancy in the Court of Appeals, took place near the close of a power-assuming war, which carried from the military into the exercise of civil authority the example of force and a neglect or disregard of written constitutions.

That instance, without another of like character to support it, and in conflict with the practice of subsequent Governors who expressly refused to exercise the power, although vacancies of the same kind and of equal necessity have occurred, does not furnish such a precedent as should command our implicit confidence in its correctness, which should always exist in a constitutional precedent.

Section 7, article 4, reads: "If a vacancy shall occur in said Court (of Appeals) from any cause, the Governor shall issue a writ of election to the proper district to fill such vacancy *for the residue of the term*: *Provided*, That if the unexpired term be less than one year, the Governor shall appoint a judge to fill such vacancy."

In construing this section two well established canons of constitutional construction should be applied: one, that effect must be given to a particular intent plainly expressed in one part of the constitution, though apparently opposed to a general intent deduced from other parts, or, as Judge Story expresses it, "the specification of particulars is the exclusion of generals;" the other, where the whole of a subject is so provided for by a clause of the constitution as to leave no doubt of the manner of its enforcement or the agency designated for that purpose, such subject is placed beyond legislative power or executive control. (*Lowe v. Commonwealth*, 3 Met. ; *Page v. Hardin*, 8 Ben. Mon.)

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It will be seen that the Governor is commanded to issue a writ of election to fill the vacancy; that it must go to the district wherein it occurs, and the writ of election must be to fill such vacancy *for the residue of the term*.

And there is no qualification of these plain expressions, except the unexpired term be less than one year, then, and then only, the Governor shall appoint a judge to fill such vacancy.

Whether this provision, while it is being complied with by the Governor and electors of the proper district, will leave any part of the residue of the term without an incumbent, does not destroy the particular intent plainly expressed by the simple language used, and authorize an interpretation of the first clause of the section that will permit some other mode of filling the vacancy *for the residue of the term*, than by writ of election issued by the Governor, and the votes of the free electors of the district wherein it occurs.

And this conclusion is sustained, not only by the elective system inaugurated by the constitution, legislative and executive construction, but by the terms of section 4, article 4, which provide that any three of the Judges of the Court of Appeals may constitute a court for the transaction of business.

And although a vacancy may occur a court still exists, and the absolute necessity for a *pro tem.* judge is thereby avoided.

It may be suggested, however, that two or more vacancies in the court might happen at the same time, and that then the necessity would arise for the action of the Governor under the general power to fill vacancies *ad interim*.

But we ask, why invest the Governor with the power to fill vacancies for the time being, rather than the people?

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The answer is, that he can do it more readily than they. Admit that to be true, yet if the framers of the constitution had intended section 9 of article 3 to apply for that reason to a vacancy in the Court of Appeals, they certainly would have specified the time within which the Governor should act, and not left it solely to his discretion, when by a not unreasonable exercise thereof he might deliberate more than six weeks in selecting an incumbent, and when the people can and have acted in that space of time. Besides the inability to prove a necessity for the Governor exercising the appointing power, not capable of being equally met by the people through an election, it is shown by the constitution that its framers never intended to place the power to constitute *a Court of Appeals* by filling vacancies in any other hands than those of the people. They said there shall be no court with power to transact business with less than three judges. And in all cases that can possibly arise where it might be necessary to the existence of a constitutional court to fill vacancies, the people and not the Governor have been expressly invested with the power under a writ of election to fill them. Under the arrangement of the constitution there cannot be at the same time less than one year unexpired of the term of office of two judges should they die or resign at the same instant, or even within one year of each other.

Should the office of any one of them become vacant within one year of the expiration of his term, the other judges would each have more than one year to serve; and under the provision of the constitution, "that if the unexpired term be less than one year the Governor shall appoint," it is clear he was not empowered to fill more than one vacancy in the Court of Appeals at the same time, although

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two might occur, because his power to appoint is limited to vacancies of less than one year's time.

This exclusion of his power to fill vacancies of more than one year's duration by the express language of the constitution, and the significant organization of the Court of Appeals, gives great force to the thought running through the constitution, that the judiciary shall not be appointed by the executive unless authority to do so is given with particularity.

The legislature, adopting the interpretation of section 7, article 4, we have placed upon it, made an exception to the law fixing the day to be appointed generally by writ or proclamation for holding an election to fill vacancies, and provided the brief space of six weeks, the shortest reasonable time for holding an election to fill a vacancy in the office of Judge of the Court of Appeals, while it fixed a much longer time within which to fill vacancies in less important offices by smaller constituencies occupying a much more limited territory.

If the construction placed on section 7, article 4, by those favoring the exercise of the power to appoint, should be adopted, it would result that the residue of the term, however long the period, could be filled by the appointment of the Governor, as the constitution does not provide *when* the writ of election shall issue.

The Governor might be satisfied with the person appointed, and decline to issue the writ; and in the absence of some legislative enactment designating the period within which such a vacancy shall be filled, the Governor could withhold or issue the writ of election at his pleasure; or he might deny the power of the legislature to direct him when to issue the writ of election, on the ground that the consti-

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tution provides the state of case in which he shall issue the writ, and having the power to issue it, claim that his power as to the time and manner of doing so is implied, and beyond legislative regulation.

Construe the clause of section 7, article 4, which directs the Governor to issue a writ of election to fill the residue of the term, as if there had been no legislation in reference to it, and it is evident the authors of the constitution intended to clothe the executive with the power to appoint only when there is less than one year of the term to expire.

The power is expressly limited by the last clause of the section, and the mode of filling the vacancy clearly pointed out in the first.

If it was the purpose to provide for the temporary appointment of a judge to serve until an election should be held, the framers of the constitution would have certainly said so, as they did in other sections, by which they provided for the temporary appointment of state officers, Clerk of the Court of Appeals, and all the executive and ministerial officers for counties and districts.

And, in conclusion, we say: If the existence or non-existence of the power in question is, or ought to be, determined by the language of section 9, article 3, and of section 7, article 4, without the aids from the various sources to which we have gone, and were they in conflict with each other, the latter must control, as it specifically provides the manner of its enforcement, by whom it shall be done, and regulates the whole subject-matter, and is, equally with the former, the behest of the organic law.

And no department of the government, whether legislative, executive, or judicial, has the power to abrogate the

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meaning of its terms or establish other modes than those embraced within its fixed limits.

With these expressions of our views of the subject upon which your Excellency has sought our advice, we inclose official notice of the death of our stainless associate, Chief Justice Martin H. Cofer, who was dear to us, and invaluable to the state.

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ACCOMPLICE—

1. A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and if a conspiracy is charged, the statements of one of the conspirators cannot be used against another, unless there is some evidence of the conspiracy other than that of the accomplice. *Bowling v. Commonwealth* 604

ACTION—

1. Sec. 8, art. 2, chap. 44, Gen. Stat., does not apply to assignments made by a debtor for the payment of his debts generally. *Dobyns v. Dobyns' assignee* 95.
2. An action at law against an assignee to whom property has been conveyed for the payment of debts, to enforce the creditor's claim, upon purely legal grounds, based alone upon the assignment and acceptance of the trust, cannot be maintained. *Ibid*, 95
3. There is no consideration for such an action. *Ibid*. 95.
4. The object of sections 641 and 643, Civil Code, is to simplify proceedings under executions, and to prevent circuitry of actions. *Chisholm v. Gooch* 468
5. The claimant or purchaser of personal property sold under execution has his action upon the indemnifying bond executed by the plaintiff, or he may sue the officer upon his official bond, if he has made himself liable by failing to take good security and return the bond as directed in these sections. *Ibid* 468
6. An assignment of the warranties in a deed which does not contain any warranty of *quantity* does not carry with it the cause of action on the implied promise of the original vendor to render compensation for a deficit in the quantity of land. *Biggs v. Lex. & B. S. R. R.* 470
7. An action to recover dower is not only a suit for the "recovery of real property," but for a freehold estate therein. *Anderson's trustee v. Sterritt, &c.* 499
8. The suit is barred within fifteen years after the cause of action accrued. *Ibid* 499
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12. If she dies, her personal representative may sue for and recover the value of her rents from the institution of her original action for dower. *Ibid* 512
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1. To obtain the benefit of the exception contained in the act of 1856, the mortgage must have been made in good faith. *Farmer v. Hawkins, &c.* 182
2. It must have been made to secure a debt or liability created simultaneously with it. *Ibid* 182
3. It must have been recorded within thirty days after its execution. *Ibid* 182
4. It is not necessary that a creditor should have judgment and return of "no property" in order to enable him to maintain an action to have a conveyance declared to have been made in contemplation of insolvency. *Griffith v. Cox, &c.* 562
5. The statute does not authorize the appointment of a receiver in such an action, except to take charge of such property as may be under the control of the person to whom the sale, mortgage, or assignment shall have been made, unless the property is in danger of being lost, removed, or materially injured; so where a mortgage does not pass the possession and control of the property mortgaged, the court has no power to compel its surrender to a receiver before it is decided that the mortgage was made in contemplation of insolvency. *Ibid* 562
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2. Having the right of appeal within one year after their majority, they may exercise the right at any time after the rendition of the judgment until the time mentioned. *Ibid* 40
3. Every question presented upon an appeal must be taken to have been disposed of by the decision upon the appeal, unless it be expressly left open for further litigation. *Smith, &c., v. Brannin, &c.* 114
4. When an appeal presents two or more questions, and the members of this court are equally divided upon one or more of them, and the judgment is reversed upon other points where there is agreement, the opinion of the judges who agree with the court below in regard to the questions as to which an equal division exists, becomes the law of the case as to such questions. *Ibid* . . . 114
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ASSIGNMENTS—

1. Sec. 8, art. 2, chap. 44, Gen. Stat., does not apply to assignments made by a debtor for the payment of his debts generally. *Dobyns v. Dobyns' assignee* 95
2. An action at law against an assignee to whom property has been conveyed for the payment of debts, to enforce the creditor's claim, upon purely legal grounds, based alone upon the assignment and acceptance of the trust, cannot be maintained. *Ibid.* 95
3. There is no consideration for such an action. *Ibid.* 95
4. The assignee of notes for purchase-money for land, the lien being carried by the assignment, does not waive his lien by accepting personal security, unless it appears that he intended so to do. *Bradley v. Curtis, &c.* 327
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1. It is not necessary that a creditor should have judgment and return of "no property" in order to enable him to maintain an action to have a conveyance declared to have been made in contemplation of insolvency. *Griffith v. Cox, &c.* 562
2. The statute does not authorize the appointment of a receiver in such an action, except to take charge of such property as may be under

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the control of the person to whom the sale, mortgage, or assignment shall have been made, unless the property is in danger of being lost, removed, or materially injured; so where a mortgage does not pass the possession and control of the property mortgaged, the court has no power to compel its surrender to a receiver before it is decided that the mortgage was made in contemplation of insolvency. *Ibid* 562

3. So long as a debtor remains solvent, no sale, mortgage, or assignment by him can be held to have been made in contemplation of insolvency, unless actual fraud be alleged and proved. *Ibid*. 562

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1. B. W. & Co. advanced money to W., upon a contract that W. would buy tobacco, prize and ship it to B. W. & Co., who were to sell it on commission, and out of the proceeds indemnify themselves for advances. W. shipped a portion to B. W. & Co., but having received \$1,290 more than he had accounted for, agreed that they might take possession of a lot of tobacco in his warehouse which he had bought for them, prize it, and account for it at the rate of nine dollars per hundred. They took possession, and afterwards W.'s creditors attached it, alleging W.'s insolvency, and that he had preferred B. W. & Co. as his creditors. Held, that the transaction did not come within the act of 1856. Brooks, &c., v. Staton's adm'r. 174

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2. From the time the advances were made there was an inchoate right to the property on which the advancements were made, and this right became complete when the creditor, with reasonable diligence, reduced it to possession before other equities intervened. *Ibid.* 174
3. Where a bond has been executed for the forthcoming of property taken under attachment, and the property is not more than sufficient to satisfy the prior liens upon it, subject to which the attachment was levied, the obligors in the bond are liable for nominal damages only for their failure to produce the property. *Hayman & Co. v. Hallam* 389
4. Although the obligation may be "to satisfy the judgment and deliver the property," it should be construed as if the disjunctive conjunction were used, as found in section 214 of the Code. *Ibid.* 389
5. To enable a defendant to have a judgment by default set aside on the ground of surprise, he must present a sufficient defense to the action. *Ibid.* 389
6. An attachment must be executed by the officer to whom it is directed, and cannot, like a summons, be executed by any officer to whom it might have been directed. *Menderson v. Specker*, 509
7. A garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand sought to be garnisheed; otherwise, no lien will be created. *Ibid.* . . 509

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1. The act "authorizing the Auditor to appoint agents to attend to revenue matters," approved April 29, 1880, is constitutional. *Hoke v. Commonwealth.* 567
2. The subject of the act is sufficiently expressed in the title. *Ibid.* 567
3. The agent is a mere subordinate, and his term ends with that of the Auditor appointing him. *Ibid.* 567
4. The act does not interfere with the duties of the assessor, but requires that to be done which he has omitted to do, and has no power to do, after the return of his books has been made to the county court. *Ibid.* 567
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BAIL BONDS—

1. The verbal statement of the judge as to the effect of the failure of the grand jury to indict the accused at the first term has no legal significance. *Walker & Hubbard v. Commonwealth*. 292
2. Accused failed to appear at the first term in discharge of the bail-bond, and under the 93d section, Criminal Code, it was the duty of the court to direct that the fact be entered of record, and there-upon his bond was, as a matter of law, forfeited. *Ibid* 292
3. His trial and conviction afterwards did not affect the forfeiture of the bond. *Ibid* 292
4. The fact that a party who has forfeited his bail-bond could not appear without danger of losing his life by mob violence will not exonerate the bail, unless the proper authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear. *Weddington, &c., v. Commonwealth*. 582

BANKRUPTCY—

1. A promise made by a debtor after he has filed his petition in bankruptcy, and before his discharge, to pay an antecedent debt, cannot be enforced. *Graves v. McGuire, Helm & Co.* 532
2. It is only a naked promise to pay a debt already existing. *Ibid*. 532
3. The acceptance of the promise by the creditor adds nothing to its significance. *Ibid* 532

BASTARDY—

1. After the father of bastard child has claimed the benefit of the insolvent debtor's oath, and an execution has been issued against him from the county court, and returned *nulla bona*, the circuit court has jurisdiction to enforce the collection of the judgment. *Brightwell v. Commonwealth* 537
2. The remedy for enforcing the judgment of the county court is not found alone in the statute in regard to bastardy. The chancellor has the power beyond the statute to compel the payment of the judgment *Ibid*. 537

BILLS OF DISCOVERY—

1. After a return of "no property" upon an execution, the growing crop of the debtor may be subjected, by a proceeding in equity, to the payment of the debt before the first of October. *Farmers' Bank v. Morris, &c.* 157
2. Although a growing crop is not subject to execution until the first day of October, yet, under the 439th section of the Civil Code, a

 Bills of Discovery. Child.

BILLS OF DISCOVERY—Continued.

court of equity, upon the return of the execution, will subject the crop, with due regard to the rights of both creditor and debtor, before that time. *Ibid* 157

BILL OF EXCEPTIONS—

1. When a road case is taken to the circuit or common pleas court, it is an appeal upon the law and facts originating and heard in the county court, and no evidence can be heard other than that found in the bill of exceptions. *Smith v. McMeekin* 24
2. Original jurisdiction in road cases is in the county court. The appellate jurisdiction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired in the county court, and the action of the court below must appear by a bill of exceptions. *Ibid* 24
3. The judgment was rendered at the September term, 1877, and time was given until the January term following to prepare and present a bill of exceptions. The bill of exceptions, when presented, was a nullity. No authority for giving the time existed when the order was made. *Yeatman v. Day* 186
4. An act of the general assembly which was passed after the bill of exceptions had been presented and signed, cannot have the effect of giving validity to a void judicial act. So much of the act of the general assembly, entitled "An act to amend subsection 2, section 337, of the Civil Code of Practice," approved February 27, 1878, as applies its provisions to appeals then pending, or thereafter prosecuted from judgments rendered and exceptions filed before it was passed, is unconstitutional, as an attempt to exercise judicial power. *Ibid* 186

BONDS—

1. The obligation of a supersedeas bond executed by a personal representative must be treated as binding him and his surety to pay the damages and costs of the appeal, and the judgment in case of affirmance, out of the assets which have or may come to his hands in the course of his administration. *Fitzpatrick, &c., v. Todd* 524
2. Such a bond cannot bind him personally. *Ibid.* 524
3. The fact that a party who has forfeited his bail-bond could not appear without danger of losing his life by mob violence will not exonerate the bail, unless the proper authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear. *Weddington, &c., v. Commonwealth.* 582

(See Attachment, Execution No. 4, Traverse Bond.)

BREACH OF THE PEACE. (See Criminal Law No. 24.)

CHILD. (See Contracts.)

 Civil Code. Constitutional Law.

CIVIL CODE—

1. Section 491 of the Civil Code, in so far as it authorizes the sale of real estate upon the petition of the life-tenant in opposition to the wishes of the owner of the fee, where the latter is not laboring under the disability of infancy or of unsound mind, is unconstitutional. *Gossom v. McFerran* 236
2. So long as the citizen is under no legal disability to act for himself in the management of his property, he is protected by the constitution from interference on the part of the state. *Ibid.* . . . 236
(*See Pleading and Practice.*)

CITY ATTORNEY. (*See Office and Officer.*)CLAIMANT'S BOND. (*See Executions No. 4.*)

COMMONWEALTH, SUITS AGAINST—

1. The commonwealth cannot be sued in her own courts without special legislative authority, and parties will not be allowed to evade this rule by ignoring the commonwealth in their suits, and proceeding directly against the public officer having the custody of the fund sought to be reached. *Tate, Treasurer, &c., v. Salmon, &c.* . . 540
2. The act of the general assembly, requiring of the Piedmont and Arlington Insurance Company a deposit of \$10,000 for the benefit of its policy-holders in this state, failing to make any provision for the disposal of the fund, the State Treasurer cannot dispose of it or be compelled to do so by order of any court until there be further legislative authority. *Ibid.* 540

CONSIDERATION—

1. The orders of the county court giving the sheriff further time to pay the balance due from him was without consideration, and revocable, and therefore did not release his sureties. *Helm, &c., v. Commonwealth* 67
2. Sec. 8, art. 2, chap. 44, Gen. Stat., does not apply to assignments made by a debtor for the payment of his debts generally. *Dobyns v. Dobyns' assignee* 95
3. An action at law against an assignee to whom property has been conveyed for the payment of debts, to enforce the creditor's claim, upon purely legal grounds, based alone upon the assignment and acceptance of the trust, cannot be maintained. *Ibid.* 95
4. There is no consideration for such an action. *Ibid.* 95
(*See Bankruptcy, Sureties No. 1.*)

CONSTITUTIONAL LAW—

1. The act, entitled "An act to amend article three of chapter five of the General Statutes," approved February 23, 1874, is unconstitutional. *Pennington v. Woolfolk* 13
2. The subject of the act is not expressed in its title. *Ibid.* . . . 13

 Constitutional Law.

CONSTITUTIONAL LAW—Continued.

3. A white person indicted by a grand jury composed wholly of persons of the white race, cannot complain because negroes were excluded by statute from the jury. *Commonwealth v. Wright*, 22
4. Only those who are prejudiced by an unconstitutional law can complain of it. *Ibid* 22
5. One who has been elected to, and engages to serve the public in an official capacity, has no right voluntarily to unfit himself for the faithful and intelligent discharge of his duties, and the law-making power may provide for his punishment in any manner not prohibited by the constitution. *Commonwealth v. Williams*, 42
6. The constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated. *Ibid* 42
7. Nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize the removal of an officer upon his conviction of such offense. *Ibid* 42
8. Intoxication cannot be deemed a misfeasance in office. Misfeasance in office is the wrong-doing of an official act. It relates to official conduct, not to conduct as an individual. *Ibid* 42
9. The state has the same power to improve its navigable streams as to improve her highways, and when it is necessary to develop the resources of the commonwealth and to facilitate commerce, contracts may be made with individuals or corporations, and, as a consideration for such improvements, the tolls arising from the use of the rivers may be transferred by the state. *Commissioners of the Sinking Fund v. Green and Barren River Navigation Co.* 73
10. An exclusive privilege to navigate any stream in the state cannot be granted, but it is competent for the state to authorize the corporation improving it, under a contract with the state, to charge tolls prescribed by the general assembly, reserving the right to all citizens to navigate the stream upon the payment of tolls. *Ibid* 73
11. The act of 9th March, 1868, entitled "An act to incorporate the Green and Barren River Navigation Company," approved March 9, 1868, coupled with the execution of the bond mentioned therein by the appellees, constituted a valid and subsisting contract between the state and the appellees. *Ibid* 73
12. The act of the general assembly, entitled "An act to repeal in part an act, entitled 'An act to incorporate the Green and Barren River Navigation Company,'" approved April 5, 1880, is unconstitutional and void. *Ibid* 73

 Constitutional Law. Contracts.

CONSTITUTIONAL LAW—Continued.

13. The contract between the state and appellees is not the subject of repeal by the general assembly. *Ibid* 73.
14. An act of the general assembly which was passed after the bill of exceptions had been presented and signed, cannot have the effect of giving validity to a void judicial act. So much of the act of the general assembly, entitled "An act to amend subsection 2, section 337, of the Civil Code of Practice," approved February 27, 1878, as applies its provisions to appeals then pending, or thereafter prosecuted from judgments rendered and exceptions filed before it was passed, is unconstitutional, as an attempt to exercise judicial power. *Yeatman v. Day*. 186
15. Section 491 of the Civil Code, in so far as it authorizes the sale of real estate upon the petition of the life-tenant in opposition to the wishes of the owner of the fee, where the latter is not laboring under the disability of infancy or of unsound mind, is unconstitutional. *Gossom, &c., v. McFerran* 236.
16. So long as the citizen is under no legal disability to act for himself in the management of his property, he is protected by the constitution from interference on the part of the state. *Ibid* . . . 236
17. The general assembly has no power to reduce the salary of the judges of criminal courts nor of the vice chancellor of the Louisville chancery court before their terms of office expire, and the act of the general assembly, entitled "An act to amend chapter 95 of General Statutes, title 'Salaries,'" approved April 13, 1880, so attempting to reduce their salaries, is unconstitutional. *Perkins v. Auditor*. 306
18. The act "authorizing the Auditor to appoint agents to attend to revenue matters," approved April 29, 1880, is constitutional. *Hoke v. Commonwealth*. 567

CONTRACTS—

1. When a surety has been discharged from legal liability upon a written obligation, by its alteration without his consent, a subsequent promise by him to pay is not binding, unless made upon some new consideration. *Warren, &c., v. Fant's trustee*. 1
2. Words added upon the margin of an obligation, and above the signatures of the obligors, by an arrangement between the obligee and principal obligor, after the delivery of the writing, are to be deemed a part of the obligation, and, if added without the consent of the sureties, and their liability is thereby increased, they are released. *Ibid* 1
3. That a *feme covert*, upon the petition of her husband and herself, is "authorized and invested with power to sue and be sued, contract and manage, sell, convey, and dispose by will any property now owned by her, or which she may hereafter acquire, either

 Contracts.

CONTRACTS—Continued.

- in real estate, personal property, or choses in action," confers no power upon her to contract so as to make herself liable as the surety of her husband or of others. *Bidwell v. Robinson & Wallace* 29
4. This court will not, by implication, enlarge the power thus given to the *feme covert* by speculating upon the intention of the chancellor who rendered the judgment. *Ibid*. 29
 5. Under the law of Louisiana, a contract made by a married woman with the authority of the husband, for the benefit of another, is binding upon her, but she cannot be held bound for the debt of the husband, nor can she, conjointly with him, be bound for debts contracted by him before or during the marriage. *Ibid* . . . 29
 6. The state has the same power to improve its navigable streams as to improve her highways, and when it is necessary to develop the resources of the commonwealth and to facilitate commerce, contracts may be made with individuals or corporations, and, as a consideration for such improvements, the tolls arising from the use of the rivers may be transferred by the state. *Commissioners of the Sinking Fund v. Green and Barren River Navigation Co.* 73
 7. An exclusive privilege to navigate any stream in the state cannot be granted, but it is competent for the state to authorize the corporation improving it, under a contract with the state, to charge tolls prescribed by the general assembly, reserving the right to all citizens to navigate the stream upon the payment of tolls. *Ibid*, 73
 8. The act of 9th March, 1868, entitled "An act to incorporate the Green and Barren River Navigation Company," approved March 9, 1868, coupled with the execution of the bond mentioned therein by the appellees, constituted a valid and subsisting contract between the state and the appellees. *Ibid* 73
 9. The act of the general assembly, entitled "An act to repeal in part an act, entitled 'An act to incorporate the Green and Barren River Navigation Company,'" approved April 5, 1880, is unconstitutional and void. *Ibid* 73
 10. The contract between the state and appellees is not the subject of repeal by the general assembly. *Ibid* 73
 11. Where a note is executed for land, and is not to bear interest until after maturity, the interest stipulated for is no part of the price of the land, but is for forbearance. *McCann's ex'r v. Bell* . . . 112
 12. Unless such note is verified and authenticated as required by the statute, and demanded of the executor or administrator within a year after his appointment, no interest arising after decedent's death can be recovered. *Ibid* 112
 13. The court erred in sustaining the demurrer to appellant's answer. *Ibid* 112

 Contracts.

CONTRACTS—Continued.

14. B. W. & Co. advanced money to W., upon a contract that W. would buy tobacco, prize and ship it to B. W. & Co., who were to sell it on commission, and out of the proceeds indemnify themselves for advances. W. shipped a portion to B. W. & Co., but having received \$1,290 more than he had accounted for, agreed that they might take possession of a lot of tobacco in his warehouse which he had bought for them, prize it, and account for it at the rate of nine dollars per hundred. They took possession, and afterwards W.'s creditors attached it, alleging W.'s insolvency, and that he had preferred B. W. & Co. as his creditors. Held, that the transaction did not come within the act of 1856. *Brooks, Waterfield & Co. v. Staton's adm'r, &c.* 174
15. From the time the advances were made there was an inchoate right to the property on which the advancements were made, and this right became complete when the creditor, with reasonable diligence, reduced it to possession before other equities intervened. *Ibid.* 174
16. The word "child" does not ordinarily embrace grandchild, but should be so construed where the manifest intention of the maker of the instrument would otherwise be defeated or the instrument rendered inoperative, or where other words show that the word was used in a more extended sense than that in which it is ordinarily used. *Duvall, &c., vs. Goodson* 224
17. As used in section 11 of the charter of the Kentucky Masonic Insurance Company, which provides that, upon the death of a member intestate without widow or *child*, the fund created by the charter shall vest in the company, the word "child" embraces grandchild, as to hold otherwise would be to defeat the manifest intention of the members of the company. *Ibid.* 224
18. Under the charter, the personal representative of a deceased member can never take any interest in the fund arising from the membership of the decedent. *Ibid.* 224
19. The company and one of its members cannot, by any stipulation in the certificate of membership, defeat the rights of those whom the charter declares to be beneficiaries. *Ibid.* 224
20. The charter gives the member a mere power of appointment in case he has neither wife or child, and, having no personal interest in the fund, it does not pass under a will disposing of all his estate, unless specifically mentioned. *Ibid.* 224
21. A life policy for the benefit of the family of the person procuring it is in the nature of a will, and, as far as possible, should be so construed. *Ibid.* 224
22. A covenant between husband and wife, that, in consideration of his receiving a sum of money devised to her by her father, he would secure the money to her separate use, and, if she died childless, it

 Contracts.

CONTRACTS—Continued.

- should go to her heirs, cannot be enforced after her death. Pope, &c., v. Shanklin. 230
23. A contract between husband and wife for the benefit of third persons, to whom the husband is under no legal or moral obligation, is void. *Ibid.* 230
24. The husband takes the personalty by survivorship. *Ibid.* . . . 230
25. A contract by which the clerk of the Louisville chancery court transfers and assigns to a trustee for the benefit of appellant, in consideration of a debt due him, all the fees and emoluments of his office in the future, until the debt is paid, with conditions to pay deputies, &c., is void. *Field v. Chipley, &c.* 260
26. It is against public policy that such contracts be enforced. *Ibid.* 260
27. The Auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them. *Ibid.* 260
28. The bank and its assignees, by the receipt of a part of the money paid toward the redemption of the land, are estopped to demand a deed or to deny appellants' right to redeem. *Fitzpatrick, &c., v. Apperson's ex'x* 272
29. The mere change of the payee or of a part of the obligors is not a payment of usury, but it is the creation of a new contract, and discharges the obligors on the old obligation; and if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted. *Ibid.* 272
30. The real estate of a *feme covert* will be subjected to the payment of a note executed by her for necessities for herself and the members of her family, even where the title to the property is acquired by the *feme sole* subsequent to the creation of the debt. *Singer Manufacturing Co. v. Harned, &c.* 279
31. A sewing-machine held to be necessary for herself and family. *Ibid.* 279
32. A mortgage executed to secure an account, without any covenant therein to pay, is a mere incident to the demand, and cannot stand upon the footing of a written obligation to pay a debt. The demand is barred in five years. *Prewitt, &c., v. Wortham, &c.* . 287
33. The agreement between appellee Doyle and Hines and wife for the exchange of real estate, the note from the latter to the former to be delivered by him to them as part of the contract, extinguished the note and all liens resulting therefrom. *Ryan v. Doyle* 363
34. The note could not be assigned by the obligee to the obligors. It was paid by the contract between them. *Ibid.* 363
35. The husband did not pay any part of the purchase price for the land, but the whole of it was paid by the wife with the proceeds of her land and distributable share in her father's estate, the husband

 Contracts.

CONTRACTS—Continued.

- agreeing that the title should be made directly to her. *Campbell, &c., v. Campbell's trustee* 395
36. Failing to have the title made to her, his conveyance afterwards to Campbell, and the conveyance of the latter to the wife, will be upheld in equity against the husband's creditors. *Ibid* 395
37. The contract between the husband and wife was post-nuptial, in which the husband became the trustee for his wife for a meritorious consideration. *Ibid* 395
38. In all cases of suretyship, in order that the act of one may bind another as surety, such act must, according to the statute, be done under authority in writing. *Billington v. Commonwealth* . . . 400
39. Section 85 of the Criminal Code does not apply to this case. *Ibid* 400
40. The commonwealth is bound by the statute as well as individuals. No exceptions are made. *Ibid* 400
41. The retention of Johnson's note by appellee as its property, after the request had been made that it issue a paid-up policy, was sufficient evidence of further grace, and a determination to demand the payment thereof. *Johnson v. Southern Mutual Life Ins. Co.* . . 403
42. Inasmuch as appellee did not notify Johnson of the forfeiture of his policy, and did not offer to surrender his note, he had the right to treat the action of appellee as a waiver of the forfeiture and a continuance of the credit extended to him for the premium embraced in part in the note. *Ibid* 403
43. In order to inflict a forfeiture, the Company is required to adhere inflexibly to the contract and its modifications, and they must not attempt to secure profits which may result from the variation of its terms and the inability of the assured to comply with the added or altered conditions. *Ibid* 403
44. The offer to surrender the original policy and the demand for a new and paid-up policy were made within a reasonable time. *Ibid*. 403
45. Where a railroad company has contracted with a subscriber to its capital stock to apply the subscription to the construction of a particular part of its road, a contractor who has done the work on that part of the road under a contract with the company has no lien on the subscription to secure the payment of his claim, unless he has contracted therefor, and the president and directors of the company are not liable for the appropriation of the subscription to the payment of other debts of the company so long as the subscriber does not complain. *Myer & Hay v. Dupont* 416
46. If such a trust exists in favor of the contractor, he cannot enforce it without alleging that a sufficient amount to pay his claim remains in the hands of the company after constructing the portion of the road to which the subscription was to be applied. *Ibid*. . . . 416

 Contracts.

CONTRACTS—(continued).

47. The resolution of the general assembly, adopted in 1840, does not authorize the Public Printer to publish any report, unless he be specially directed to do so by the legislature. *The Auditor v. Major* 457
48. The act of March 10, 1870, and the resolution of March 12, 1878, expressly provide that the printing for the Insurance Bureau shall be paid for out of the fees and allowances received by the Commissioner under the law creating the Bureau. *Ibid* 457
49. The object of the act establishing the Insurance Bureau is that it should be self-sustaining. *Ibid* 457
50. A party who sees an obligation with his name signed to it without his authority or consent, yet tells the obligee that the signature is his and he is bound by it (the representation resulting in the obligee forbearing to sue until the principal becomes insolvent) will be estopped to say afterwards that it is not his act and deed. *Rudd v. Matthews* 479
51. Reason and the policy of the law forbid that a party who is apparently an obligor should assert that he is such, and bound by his obligation, and afterwards escape the debt by his plea of *non est factum*. *Ibid* 479
52. A settlement made in good faith by the husband upon his wife, in the execution of an antenuptial contract, in writing, although void at law, will be sustained by the chancellor. *Sanders, &c., v. Miller, &c.* 517
53. Marriage is a good consideration for such a contract and settlement, and if made in good faith, the settlement will not be disturbed at the instance of creditors. *Ibid* 517
54. The obligation of a supersedeas bond executed by a personal representative must be treated as binding him and his surety to pay the damages and costs of the appeal, and the judgment in case of affirmance, out of the assets which have or may come to his hands in the course of his administration. *Fitzpatrick, &c., v. Todd, &c.* 524
55. Such a bond cannot bind him personally. *Ibid* 524
56. A promise made by a debtor after he has filed his petition in bankruptcy, and before his discharge, to pay an antecedent debt, cannot be enforced. *Graves v. McGuire, Helm & Co.* 532
57. It is only a naked promise to pay a debt already existing. *Ibid* 532
58. The acceptance of the promise by the creditor adds nothing to its significance. *Ibid* 532
59. Where several persons jointly undertake to subscribe to the capital stock of a company to be organized for the prosecution of a common enterprise, which has for its object the advancement of the private interests of the several subscribers, the promise by each is

 Contracts. Corporations.

CONTRACTS—Continued.

- a good consideration for the promise of the others, and it is too late, after the act of incorporation takes place, to withdraw from the association, whether the work has or not been undertaken. Twin Creek and Colemansville Turnpike Co. v. Lancaster . . . 552
60. As the subscribers agreed in this case that their subscriptions should be subject to a call of ten per cent. as soon as the company should be organized, the undertaking was not a mere agreement to subscribe, but was in fact a subscription subject to no other condition than the organization of the company, and as soon as that was completed and the call made, it was the duty of the subscribers to pay. *Ibid.* . . . 552
61. The fact that a party who has forfeited his bail-bond could not appear without danger of losing his life by mob violence will not exonerate the bail, unless the proper authorities were applied to, and were unable or unwilling to extend to the accused the protection necessary to enable him to appear. Weddington, &c., v. Commonwealth . . . 582

CONTRIBUTORY NEGLIGENCE. (*See Negligence.*)

CONVEYANCES—

1. Husband and wife join in a conveyance of the wife's real estate to her sister, with the object of having it reconveyed by her to the wife, with power to dispose of it by will or otherwise, and it was so conveyed. The wife devised it to her husband. Parrott, &c., v. Kelly, &c. . . . 490
2. The title passed by the devise. *Ibid.* . . . 490
(*See Husband and Wife.*)

CORPORATIONS—

1. The president and directors of a corporation, having the power to institute an action, have the power to dismiss it. Shawhan, &c., v. Zinn, &c. . . . 300
2. In order to enable a stockholder to sue for the corporation, or his associate stockholders, where the rights of the corporation are involved, he must allege that the directors decline to sue, or refuse to permit him to sue in the name of the corporation, and the corporation must be a party plaintiff or defendant. *Ibid.* . . . 300
3. The failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer, but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court. *Ibid.* . . . 300
4. If the plaintiff fails to make the corporation a party, it is not proper for the court to require him to do so, and his action should be dismissed absolutely. *Ibid.* . . . 300
5. Where several persons jointly undertake to subscribe to the capital stock of a company to be organized for the prosecution of a common

Corporations. Criminal Law.

CORPORATIONS—Continued.

- enterprise, which has for its object the advancement of the private interests of the several subscribers, the promise by each is a good consideration for the promise of the others, and it is too late, after the act of incorporation takes place, to withdraw from the association, whether the work has or not been undertaken. *Twin Creek and Colemansville Turnpike Company v. Lancaster* . . . 552
6. As the subscribers agreed in this case that their subscriptions should be subject to a call of ten per cent. as soon as the company should be organized, the undertaking was not a mere agreement to subscribe, but was in fact a subscription subject to no other condition than the organization of the company, and as soon as that was completed and the call made, it was the duty of the subscribers to pay. *Ibid* . . . 552

COUNTER-CLAIM -

1. A plaintiff, by joining issue upon a counter-claim of the defendant, waives all right to object to that pleading, because the caption does not contain the words "answer and counter-claim," as required by subsection 4, section 97, Civil Code. That section applies where the plaintiff has failed to reply. *Cason v. Cason* . . . 558

COUNTY COURTS—

1. The county court, although classed in the judiciary department by the constitution, and possessing judicial powers, is not exclusively a judicial tribunal. Many other matters not judicial have been vested in this court since the adoption of the first constitution of Kentucky. *Pennington v. Woolfolk, &c.* . . . 13
2. The act, entitled "An act to amend article three of chapter five of the General Statutes," approved February 23, 1874, is unconstitutional. *Ibid* . . . 13
3. The subject of the act is not expressed in its title. *Ibid* . . . 13
4. When a road case is taken to the circuit or common pleas court, it is an appeal upon the law and facts originating and heard in the county court, and no evidence can be heard other than that found in the bill of exceptions. *Smith v. McMeekin* . . . 24
5. Original jurisdiction in road cases is in the county court. The appellate jurisdiction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired in the county court, and the action of the court below must appear by a bill of exceptions. *Ibid* . . . 24
- (See *Sheriff's, Appeal*.)

COUNTY JUDGE. (See *Office and Officer, Officers.*)

CRIMINAL LAW -

1. A white person indicted by a grand jury composed wholly of persons of the white race, cannot complain because negroes were excluded by statute from the jury. *Commonwealth v. Wright* . . . 22

Criminal Law.

CRIMINAL LAW—Continued.

2. Only those who are prejudiced by an unconstitutional law can complain of it. *Ibid* 22
3. Where an alternative punishment is denounced by the statute for an offense, the jury should be instructed and required to fix the kind and extent of the punishment, within the limits prescribed by the law. *Herron v. Commonwealth*. 38
4. It was error for the court, upon a verdict of guilty, to fix the punishment when it was in the alternative. *Ibid* 38
5. No penalty has been denounced against a person *not a merchant* for selling vinous or spirituous liquors when they are not drunk on the premises where sold, or adjacent thereto. *Commonwealth v. Wheeler* 284
6. Before a person is required to obtain a license to sell whisky, he must be engaged in merchandising, and in the sale of other things than spirituous liquors. *Ibid* 284
7. A person who sells in a house under his control pools upon horse-racing is punishable under an indictment for keeping a "disorderly house." *Cheek vs. Commonwealth* 359
8. See opinion for definition of "gaming," and for the term "disorderly house." *Ibid* 359
9. Jury commissioners are not bound to select negro jurors. All that the accused can claim is, that no citizen otherwise competent shall be excluded by law on account of race or color. *Haggard v. Commonwealth* 366
10. The proper way in which to take advantage of an irregularity in the summoning or formation of a grand jury is by motion to set aside the indictment, and if no such motion is made, the irregularity is waived. So also any irregularity in the summoning of a petit jury is waived by a failure to challenge the panel. *Ibid*. 366
11. The right of a party to be tried by a jury selected without discrimination on account of race or color is a right which may be waived. *Ibid* 366
12. Shooting and wounding another is an assault and battery, although unintentional, and the action therefor dies with the person injuring or the person injured. *Anderson v. Arnold's ex'rs.* 370
13. When the act complained of, and not the consequences of the act, causes the injury, the remedy is trespass and not case. *Ibid* . 370
14. The appellant had exercised all proper diligence in attempting to obtain his witnesses, and the court should have granted him a continuance. *Salisbury v. Commonwealth* 425
15. The indictment is sufficient. *Ibid* 425
16. The motion to compel appellee to elect upon which count of the indictment it would proceed was properly overruled. *Ibid*. . . 425
17. The evidence as to where deceased had been and what he had been doing for several days before the killing was incompetent. *Ibid*. 425

Criminal Law.

CRIMINAL LAW—Continued.

18. The court should have, upon the appellant's motion, excluded the father-in-law of deceased, who was a witness for appellee, while the other witnesses were testifying. *Ibid* 425
19. There is no law requiring the court to cause the bodies of deceased persons to be exhumed at the cost of the commonwealth. *Ibid*. 425
20. The court erred in its instruction to the jury in regard to malice. *Ibid* 425
21. The statute under which appellant was indicted is intended to punish a person who detains a female against her will for the purpose of having carnal knowledge of her, and to create an offense less than that of rape. *Evans v. Commonwealth* 414
22. It was for the jury to decide upon the credibility of witnesses. *Ibid* 414
23. There is no error in the instructions. *Ibid* 414
24. "Intimidating, alarming, and disturbing any person," &c., denounced in section 2 of the act, entitled "An act to amend chapter 28, Revised Statutes," approved April 11, 1873, imply the use of physical force or menace, and involve a breach of the peace. *Embry v. Commonwealth* 439
25. The indictment is insufficient. *Ibid* 439
26. It is no objection to an indictment that the time of committing an offense is laid on the same day it is presented to the court and filed, provided it alleges that the offense was committed before the time of finding it. *The Commonwealth v. Miller* 451
27. The fifth instruction for appellee is error. *Minton v. Commonwealth* 461
28. Whenever a person is in imminent danger of great bodily harm, or it is being inflicted upon him, whether it endanger his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment to be necessary to repel or deliver himself from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him. *Ibid* 461
29. The third instruction, taken in connection with the fifth, excludes appellant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure any one thereby. An instruction should have been given to meet that view of the case. *Ibid* 461
30. A person may in the same indictment be charged with more than one violation of the "local option" law, but each offense must be specially charged, and the statement of the circumstances of each case be direct and certain. *South v. Commonwealth*. 493
31. A person who sells liquor for himself or another, or authorizes another to sell for him, may be guilty of violating this law; but he is not guilty if the sale be made by another, although done in

Criminal Law. Damages.

CRIMINAL LAW—Continued.

- his presence and at his solicitation, unless he be the owner of the liquor sold. *Ibid.* 493
32. It is not necessary that the indictment under this act should allege the want of license. *Ibid.* 493
33. Upon the trial of an indictment against a married woman and another for malicious cutting and wounding her husband, he is not a competent witness against his wife. *Turnbull v. Commonwealth.* 495
34. Section 24, chapter 37, title "Evidence," applies to criminal as well as to civil cases. *Ibid.* 495
35. In cases of house-breaking, which are analogous to burglaries at common law, whether the place of ingress was a part of the house charged to have been broken into, is a question of law for the court, and not a question of fact for the jury. *Commonwealth v. Bruce.* 560
36. Where there is internal communication between the apartment broken into and the room or building which the accused is charged to have feloniously entered, the offense is complete so far as the act of breaking and entering is concerned. *Ibid.* 560
37. Although a judgment of acquittal in a felony case cannot be reversed, it may be reviewed on the appeal of the commonwealth for the purpose of securing a uniform and correct administration of justice. *Ibid.* 560
38. A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and if a conspiracy is charged, the statements of one of the conspirators cannot be used against another, unless there is some evidence of the conspiracy other than that of the accomplice. *Bowling v. Commonwealth,* 604
39. The machine known as "French pool" or "Paris mutual," used in betting on horse-racing, is a "contrivance used in betting" within the meaning of section 6, article 1, chapter 47, General Statutes. *Commonwealth v. Simonds.* 618

DAMAGES - -

1. The remedy given by chapter 66, article 2, section 26, General Statutes, is cumulative, and it is within the discretion of the party whose property has been wrongfully distrained by his landlord to declare under the statute, or pursue his remedy at common law. *Bell v. Norris.* 48
2. The double damages, or double the value of the property sold, provided for in this section, is in the nature of a penalty. *Ibid.* 48
3. If the plaintiff seeks to recover double damages for the wrongful seizure of his property, or double the value of his property wrongfully sold under a distress warrant, he must distinctly declare *under*

Damages. Decedent's Estate.

DAMAGES—Continued.

- the statute.* He must recite the statute, or conclude to the damage of the plaintiff contrary to the form of the statute. *Ibid* . . . 48
4. The obligation of a supersedeas bond executed by a personal representative must be treated as binding him and his surety to pay the damages and costs of the appeal, and the judgment in case of affirmance, out of the assets which have or may come to his hands, in the course of his administration. *Fitzpatrick, &c., v. Todd, &c.* 524
5. Such a bond cannot bind him personally. *Ibid.* 524

DEBTOR AND CREDITOR—

1. A debtor, desiring to prefer his individual creditors to the exclusion of those to whom he was liable as surety merely, in order to accomplish that purpose, sold his property, and applied the proceeds to the payment of his individual debts. This, whether so intended or not, was an evasion of the act of 1856. *King, &c., v. Moody* . . . 63
2. Whenever the debtor contemplates insolvency, and, with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not obtain without such act of the debtor, it comes within the act of 1856. *Ibid.* 63

DEBTS—

1. Property devised in trust, leaving it discretionary with trustee whether the beneficiary shall have any of the property devised, cannot be subjected to payment of debt of beneficiary. *Davidson's ex'rs v. Kemper* 5

DECEDENT'S ESTATE—

1. In order to enable a defendant to plead, as a counter-claim or set-off, a claim against the estate of a decedent, it must be verified and proved in the manner required by law in the case of claims sued upon by original action, but demand may be dispensed with. *Warfield, &c., vs. Gardner's adm'r, &c.* 583
2. An affidavit in the body of the answer is not sufficient. The claim should be verified and proved in the manner required by law and filed *with* the answer. *Ibid* 583
3. The allegation in the petition that the plaintiffs were, by an order of the Hardin county court, appointed administrators, and qualified as such, is a substantial compliance with section 122, Civil Code, as the law raises the presumption that the order was *duly* made. *Ibid* 583
4. The failure of the petition to state facts showing that the Hardin county court had jurisdiction to make the order should have been taken advantage of by special demurrer. *Ibid* 583
(See *Executors and Administrators.*)

Dedication. Devisor and Devisee.

DEDICATION—

1. Where a dedication of a highway is claimed to have been made to the public, reason and authority require that the acceptance of the dedication must have been made by the county court upon its records, or by such acts of control or recognition as will furnish a presumption of its existence. *Wilkins v. Barnes, &c.* 323
2. Without an acceptance of a dedication by the constituted representative of the public in its organic capacity, it is ineffectual. *Ibid.* 323

DEVISES—

1. Although a testator has no right to alter the laws of descent, he may designate and exclude from participation in his estate persons who would otherwise inherit. *Tabor, &c., v. McIntire, &c.* 505
2. The following paper, wholly written and signed by the testatrix, is held to be a valid will: "For sundry reasons and bad treatment, it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire, only through a responsible trustee, in the way of clothes and something to keep him from suffering." *Ibid.* 505
3. The excluded heir being one of two children of a deceased sister of the testatrix, his brother is entitled to their mother's whole share to the exclusion of the brothers and sisters of the testatrix. *Ibid.* 505
4. Thomas McIntire, a brother of the testatrix, is not entitled to a share absolutely, but a share should be invested for him by his trustee, so much of the interest to be used as may be required to furnish him annually with clothing, food, and shelter; and if the interest should not be sufficient for that purpose, the principal may be used as his annual necessities may demand. *Ibid.* 505
(See *Trustee and Trustees.*)

DEVISOR AND DEVISEE—

1. It is manifest that the widow of the devisor acquired only an estate for life in the lands devised to her by the second clause of the will. *Dehoney, &c., v. Taylor.* 124
2. The power given to the executors by the seventh clause to sell and convey any portion of the devisor's estate must be construed with the other provisions of the will. *Ibid.* 124
3. The meaning of the testator is, "the executors are vested with the title to sell certain tracts of land I have directed to be sold, without restriction or limitation; but the land devised to my wife is to be sold *after her death*, and the proceeds distributed as directed by me." *Ibid.* 124
4. His intention was to give her a home for life, and that after her death the land should be sold. *Ibid.* 124

 Devisor and Devisee. Dower.

DEVISOR AND DEVISEE—Continued.

5. The widow had no authority to sell any greater interest than her life estate. *Ibid* 124
6. There is no evidence that appellants consented to or acquiesced in the sale of the lands by the widow. *Ibid* 124

DISORDERLY HOUSE—

1. A person who sells in a house under his control pools upon horse-racing is punishable under an indictment for keeping a "disorderly house." *Cheek v. Commonwealth* 359
3. See opinion for definition of "gaming," and for the term "disorderly house." *Ibid.* 359

DILIGENCE. (See *Railroads*.)DISTRESS WARRANT. (See *Landlord and Tenant*.)

DOMICILE—

1. A guardian is appointed for an infant at the domicile of her father at his death in Kentucky. The infant is taken out of this state without the consent of the guardian, and carried to Texas. A guardian selected by her in Texas after she is fourteen years of age cannot sue the guardian in Kentucky for rents of the infant's lands, collected by him here. *Munday, &c., v. Baldwin* . . . 121
2. The infant having a guardian in Kentucky is not a non-resident of the state, as she could not consent to leave it, and the court in Texas had no jurisdiction to appoint another guardian, or to displace the guardian in this state. The infant's domicile is in this state. *Ibid* 121

DOWER—

1. Where a husband finds it necessary to sell, and does sell land to pay purchase-money due thereon, although he sells more than will pay the lien upon it, if he sells in good faith his widow is not entitled to dower in any part of the land. *Melone v. Armstrong* . . . 248
2. An action to recover dower is not only a suit for the "recovery of real property," but for a freehold estate therein. *Anderson's trustee, &c., v. Sterritt, &c.* 499
3. The suit is barred within fifteen years after the cause of action accrued. *Ibid* 499
4. The possession of the vendees is adverse to the widow of the vendor. *Ibid* 499
5. A widow suing to recover dower in land alienated by her husband during his life-time is entitled to recover rents from the institution of her action. *Magruder v. Smith* 512
6. She might, by amended petition, assert her claim to rents from the filing of her suit for dower. *Ibid* 512

Dower. Evidence.

DOWER—Continued.

7. If she dies, her personal representative may sue for and recover the value of her rents from the institution of her original action for dower. *Ibid.* 512
8. A widow is entitled to one third of the rents and profits of her husband's dowerable real estate from his death until dower is assigned, notwithstanding the existence of a vendor's lien. *Wilson, &c., v. Ewing, &c.* 549
9. The lien of a vendor is upon the land alone, and does not extend to the rents and profits. *Ibid.* 549

ELECTION. (See *Pleading and Practice.*)

ERRORS—

1. Although the court below erred in adjudging the costs against the non-resident to be paid by the resident defendant, the error is too insignificant to reverse upon it. *Moore v. Estes* 282

ESTOPPEL—

1. Although a vendor may have a lien upon real estate conveyed by him to his son and daughter by deed of record, yet, if he announce to a third party that he had given them the land, and that she might safely loan them money, and secure her loan by a mortgage upon it, and upon the faith of his statement she makes the loan and takes a mortgage, his lien will be subordinated to hers for the payment of the mortgage debt. *Alexander v. Ellison* 148
2. A party will not be permitted by the chancellor to lead another to believe by his assurances that land is unencumbered, and induce another to loan money upon its security, and afterwards defeat the recovery of the money by asserting a lien of his own, in existence when he advised the loan. *Ibid.* 148
3. The bank and its assignees, by the receipt of a part of the money paid toward the redemption of the land, are estopped to demand a deed or to deny appellants' right to redeem. *Fitzpatrick, &c., v. Apperson's ex'rs* 272
4. A party who sees an obligation with his name signed to it without his authority or consent, yet tells the obligee that the signature is his and he is bound by it (the representation resulting in the obligee forbearing to sue until the principal becomes insolvent) will be estopped to say afterwards that it is not his act and deed. *Rudd v. Matthews* 479
5. Reason and the policy of the law forbid that a party who is apparently an obligor should assert that he is such, and bound by his obligation, and afterwards escape the debt by his plea of *non est factum*. *Ibid.* 479

EVIDENCE—

1. An executor, or representative of a testator or intestate, cannot, when sued in his representative capacity, testify in regard to mat-

Evidence.

EVIDENCE—Continued.

- ters occurring between himself and the decedent whose representative is prosecuting the action against him. *Hobbs' ex'r v. Russell's ex'r* 61
2. That the executor was also sued in his individual capacity in the same suit does not affect the question. *Ibid.* 61
 3. Evidence of injury to appellee's child should not have been permitted; but as the jury were instructed that they should not find any damages on that account, the judgment should not be reversed therefor. Proof that another bridge was out of repair was error. *Muldraugh's Hill, &c., v. Maupin* 101
 4. The professional opinion of a physician as to the extent of appellee's injuries was competent. *Ibid.* 101
 5. But the opinion of the witness as to the amount of damages appellee should recover was incompetent. *Ibid.* 101
 6. A party who is making no issue hostile to the claim of a decedent's executor, is a competent witness when offered by a co-obligor who makes a defense against the estate. *Mix v. Marders' ex'r* . . . 131
 7. In a suit by an executor against a principal and surety, the principal makes no defense, and judgment is rendered against him. The surety relies upon usury, and offers the principal as a witness to establish his plea. He is a competent witness. *Ibid.* . . . 131
 8. Before the contents of the two newspapers could lawfully be proven, their absence should have been accounted for, either by proving their loss or the inability of the appellee, after a *bona fide effort*, to obtain them. *Ormsby, &c., v. City of Louisville.* 197
 9. The fact that the notices required by the levy ordinances were published should have been distinctly alleged and proved. *Ibid.* 197
 10. The description and valuation of the lots sought to be taxed are sufficient. *Ibid.* 197
 11. One whose house has been set on fire may, with proper precaution and without malice, tell his family his suspicions as to who did it, and, so doing, will not be liable to an action by a person wrongfully accused. *Campbell v. Bannister* 205
 12. The fact that he repeated the accusation to others may be given in evidence to show that the communication to his family was malicious. *Ibid.* 205
 13. A new assignment re-states, in a more minute and circumstantial manner, the cause of action. It is in the nature of a new petition. *Ibid.* 205
 14. Evidence of appellant's bad character was admissible, but only such witnesses as knew his reputation were competent. Evidence as to particular facts is not competent. *Ibid.* 205
 15. Appellee had the right to testify, and state that when he told his wife appellant burned his house, he told her not to speak of it. *Ibid.* 205

Evidence.

EVIDENCE—Continued.

16. Appellee is not restricted, in proof of bad character, to such persons as he had heard speak of appellant. *Ibid* 205
17. Appellee had no right to say to a juror "don't hang." It was an insult to the juror and a contempt of court. *Ibid* 205
18. Oral evidence is competent to prove that notes due at a specified time were, by agreement, not to bear interest after maturity. *Elliott v. Elliott's adm'r* 277
19. The evidence of the alleged agreement is not sufficient to establish it. *Ibid* 277
20. The admissibility of ancient deeds does not depend upon the fact that the party producing them is in possession of the land in controversy. *Harlan, &c., v. Howard, &c.* 373
21. A deed over thirty years old, unblemished by alterations, and produced by those whose custody affords a reasonable presumption that it is genuine, proves itself, the witnesses of the fact being presumed to be dead. *Ibid* 373
22. The credibility of the evidence contained in such deeds belongs to the jury. *Ibid.* 373
23. There was sufficient evidence upon the issue to allow the case to go to the jury. *Ibid* 373
24. Section 62, Civil Code, has changed the rule in regard to possession of land lying in two counties. *Ibid* 373
25. The mere possession of a promissory note is not *prima facie* evidence of ownership as against the payee or his personal representative. The burden of proof is on the claimant to show that his possession is rightful. *Gano v. McCarthy's adm'r* 409
26. That the party in possession of the note said at the time she assigned it that she had acquired it as a gift from the payee was not competent to establish the gift, nor as a part of the *res gestæ*. *Ibid* 409
27. The evidence as to where deceased had been and what he had been doing for several days before the killing was incompetent. *Salisbury v. Commonwealth* 425
28. The court should have, upon the appellant's motion, excluded the father-in-law of deceased, who was a witness for appellee, while the other witnesses were testifying. *Ibid.* 425
29. There is no law requiring the court to cause the bodies of deceased persons to be exhumed at the cost of the commonwealth. *Ibid*, 425
30. Upon the trial of an indictment against a married woman and another for malicious cutting and wounding her husband, he is not a competent witness against his wife. *Turnbull v. Commonwealth* 495
31. Section 24, chapter 37, title "Evidence," applies to criminal as well as to civil cases. *Ibid.* 495
32. A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the de-

Evidence. Execution.

EVIDENCE—Continued.

- fendant with the commission of the offense, and if a conspiracy is charged the statements of one of the conspirators cannot be used against another, unless there is some evidence of the conspiracy other than that of the accomplice. *Bowling v. Commonwealth*, 604
33. The attestation of the subscribing witnesses to a will is to the genuineness of the testator's signature, and not as to the contents of the paper. It is not necessary that they should know that the paper is a will. *Flood, &c. v. Pragoff, &c.* 607
34. When a paper is presented for probate, and it appears upon its face to be a will or codicil in regular form, without marks of alteration or other suspicious indications, the presumption is that the writing was on it when it was signed, and the testator knew its contents. The burden of proof is upon the contestants to show fraud, incapacity, or undue influence. *Ibid* 607
35. The date of the execution of a will or codicil may be shown by the writing itself or by extraneous proof. The statute requiring that the signature of the testator be placed at the "end or close thereof" is complied with, although it precedes the date. *Ibid* . . 607
36. The object of the exceptions to the rule admitting parties in interest to testify is to place both the parties upon an equal footing. In a contest as to the probate of a will, a devisee is a competent witness as to transactions between himself and the testator, all the claimants under the will being entitled to the same privilege. *Ibid*. 607
37. The instructions objected to are error; but as they neutralize each other, they do not prejudice appellants. *Ibid* 607

EXCEPTIONS—

1. A trial in chancery is not ended until final judgment is recorded, and under Myers' Code, which provided that exceptions to the competency of depositions might be filed at any time during the progress of the trial, such exceptions were in time, although not filed until after the court announced its conclusion from the bench. *Cooksey, &c., v. Cassidy, &c.* 392
2. In the absence of an objection to the filing of the exceptions, appellants cannot complain of the action of the court in permitting them to be filed. *Ibid* 392

EXECUTION—

1. After a return of "no property" upon an execution, the growing crop of the debtor may be subjected, by a proceeding in equity, to the payment of the debt before the first of October. *Farmers' Bank of Kentucky v. Morris, &c.* 157
2. Although a growing crop is not subject to execution until the first day of October, yet, under the 439th section of the Civil Code, a court of equity, upon the return of the execution, will subject the crop, with due regard to the rights of both creditor and debtor, before that time. *Ibid* 157

 Execution. Executors and Administrators.

EXECUTION—Continued.

3. The object of sections 641 and 643, Civil Code, is to simplify proceedings under executions, and to prevent circuity of actions. *Chisholm v. Gooch, &c.* 468
4. The claimant or purchaser of personal property sold under execution has his action upon the indemnifying bond executed by the plaintiff, or he may sue the officer upon his official bond, if he has made himself liable by failing to take good security and return the bond as directed in these sections. *Ibid.* 468.

EXECUTORS AND ADMINISTRATORS—

1. An executor, or representative of a testator or intestate, cannot, when sued in his representative capacity, testify in regard to matters occurring between himself and the decedent whose representative is prosecuting the action against him. *Hobb's ex'r v. Russell's ex'r.* 61
2. That the executor was also sued in his individual capacity in the same suit does not affect the question. *Ibid.* 61
3. One who is nominated executor of a will has such an interest as gives him the right to appeal from the judgment of a county court rejecting the will. *Pryor v. Mizner, &c.* 232
4. Although a public administrator resigns his office, he is still the representative of each and every estate committed to his hands before his resignation. He must administer such estates, and his sureties are bound for the faithful discharge of his duties as to each estate so committed to him. *Olsen's adm'r v. Rich.* 244
5. The executor had no authority, express or implied, to bind the devisees by his acknowledgment of appellant's demand in writing, so as to subject the devisees to its payment. *Grotenkemper v. Bryson, &c.* 353
6. Appellant's demand is barred by the statute of limitations. *Ibid.* 353
7. The *fourth* clause of John W. Barrett's will creates a precatory trust in favor of appellant, Lillie Bohon, late Barrett. When she performed the requirements of the will, the executor had no discretion, but must pay to her the amount indicated by it. *Bohon, &c., v. Barrett's ex'rs.* 378
8. The discretion given to the executor is only as to the mode of expending the money for her benefit, and settling it upon her. *Ibid.* 378
9. When an action has been filed by a personal representative to settle an estate under chapter 3, title 10, Civil Code, it is in the sound discretion of the chancellor to prescribe the time within which creditors may present their demands proved and verified according to law. *Gray's ex'rs v. Lewis, &c.* 453
10. The object of the legislature is not to discriminate against non-resident creditors, but to facilitate the settlement and disposal of estates of persons not resident at the time of their death. *Ibid.* 453

 Executors and Administrators. Forfeiture.

EXECUTORS AND ADMINISTRATORS—Continued.

11. The limitation of two years is the period within which the personal representative is required to dispose of such estates. But while assets remain in his hands creditors elsewhere, as well as in Kentucky, may, even after two years, prove and demand their claims against the estate. *Ibid.* 453
(See *Wills*.)

EXECUTORS. (See *Trusts and Trustees*.)**FEME COVERT—**

1. That a *feme covert*, upon the petition of her husband and herself, is "authorized and invested with power to sue and be sued, contract and manage, sell, convey, and dispose by will, any property now owned by her, or which she may hereafter acquire, either in real estate, personal property, or choses in action," confers no power upon her to contract so as to make herself liable as the surety of her husband or of others. *Bidwell v. Robinson & Wallace* 29
2. This court will not, by implication, enlarge the power thus given to the *feme covert* by speculating upon the intention of the chancellor who rendered the judgment. *Ibid.* 29
3. Under the law of Louisiana, a contract made by a married woman with the authority of the husband, for the benefit of another, is binding upon her, but she cannot be held bound for the debt of the husband, nor can she, conjointly with him, be bound for debts contracted by him before or during the marriage. *Ibid.* . . . 29

FEME SOLE—

1. Before a married woman can successfully demand the power to trade and do business as a *feme sole*, it must appear either that she has property, or a trade, calling, employment, or business, by which she can acquire property that calls for protection, under which she may enjoy the benefits of the one and the fruits of the other. *Franklin, ex parte.* 497
2. The statute was enacted not for the benefit of certain classes of married women, but for all alike. *Ibid.* 497
(See *Husband and Wife, Contracts* Nos. 3, 4, 30.)

FORFEITURE—

1. In order to inflict a forfeiture, the company is required to adhere inflexibly to the contract and its modifications, and they must not attempt to secure profits which may result from the variation of its terms and the inability of the assured to comply with the added or altered conditions. *Johnson v. Southern Mutual Life Insurance Company* 403
2. The offer to surrender the original policy and the demand for a new and paid-up policy were made within a reasonable time. *Ibid.* 403

 Fraud. Guardian and Ward.

FRAUD—

1. A mortgagor, by fraudulently concealing material facts, induces a mortgagee with a prior lien to release it and take a new mortgage, the latter believing that the property is unencumbered, and resulting in giving another mortgagee priority. *Farmers and Drovers' Insurance Company v. German Insurance Company* 598
2. Equity will restore the party defrauded to the benefit of his prior lien. *Ibid* 598

FRENCH POOL—

1. The machine known as "French pool" or "Paris mutual," used in betting on horse-racing, is a "contrivance used in betting" within the meaning of section 6, article 1, chapter 47, General Statutes. *Commonwealth v. Simonds* 618

GARNISHEE—

1. An attachment must be executed by the officer to whom it is directed, and cannot, like a summons, be executed by any officer to whom it might have been directed. *Menderson, &c., v. Specker, &c.* 509
2. A garnishee must be served with a copy of the order of attachment, together with a notice specifying the debt or demand sought to be garnisheed; otherwise, no lien will be created. *Ibid* 509

GOVERNOR—

1. The Governor has no power to fill a vacancy in the office of a Judge of the Court of Appeals, unless the unexpired term shall be less than one year, in which case he may fill such vacancy by appointment 621

GUARDIAN AND WARD—

1. A guardian is appointed for an infant at the domicile of her father at his death in Kentucky. The infant is taken out of this state without the consent of the guardian, and carried to Texas. A guardian selected by her in Texas after she is fourteen years of age cannot sue the guardian in Kentucky for rents of the infant's lands, collected by him here. *Munday, &c., v. Baldwin* . . . 121
2. The infant having a guardian in Kentucky is not a non-resident of the state, as she could not consent to leave it, and the court in Texas had no jurisdiction to appoint another guardian, or to displace the guardian in this state. The infant's domicile is in this state. *Ibid* 121
3. The guardian should not be charged with interest upon interest in biennial rests, as no balance was owing by him at the end of any year after his appointment. *Campbell v. Golden, &c.* 544
4. The principal of the funds of the ward, or such part as is necessary, may be used by the guardian when the ward is of such tender years or infirm health that he cannot be apprenticed, or no suitable person will take him as such for nurture and education. *Ibid* 544

 Highways. House-Breaking.

HIGHWAYS—

1. Where a dedication of a highway is claimed to have been made to the public, reason and authority require that the acceptance of the dedication must have been made by the county court upon its records, or by such acts of control or recognition as will furnish a presumption of its existence. *Wilkins v. Barnes, &c.* 323
2. Without an acceptance of a dedication by the constituted representative of the public in its organic capacity, it is ineffectual. *Ibid.* 323

HOMESTEAD—

1. As long as purchase-money can be traced, no matter how often the evidence of the debt be changed, the lien therefor cannot be defeated by a claim to a homestead. *Bradley v. Curtis* 327
2. When the right to a homestead, as such, is derivative, the legal title to the land is in the heirs, subject to the right of occupancy; but when it is original, the title is in the party claiming the homestead, with the right to dispose of it as well as its proceeds. *Allensworth v. Kimbrough* 332
3. The appellant, as the devisee of her husband, holds an independent right to a homestead in the land devised, which cannot be subjected to debts incurred by her after his death. *Ibid.* . . . 332
4. The law gives to a widow a homestead for her use as long as she occupies it by herself, her tenant, or agent, without reference to the kind or value of other property she may have in her own right, or the source whence she derived it, and she cannot be divested of it, except by her own act. *Sansberry v. Simms' adm'x.* 527
5. The property given to her by her husband before his death cannot be estimated in fixing the value of her homestead. *Ibid.* . . . 527
6. It was error for the court to adjudge that she was entitled to one thousand dollars absolutely out of the sale of her husband's land. Her estate in it is for life only. *Ibid.* 527

HOUSE-BREAKING—

1. In cases of house-breaking, which are analogous to burglaries at common law, whether the place of ingress was a part of the house charged to have been broken into, is a question of law for the court, and not a question of fact for the jury. *Commonwealth v. Bruce* 560
2. Where there is internal communication between the apartment broken into and the room or building which the accused is charged to have feloniously entered, the offense is complete so far as the act of breaking and entering is concerned. *Ibid.* . . . 560
3. Although a judgment of acquittal in a felony case cannot be reversed, it may be reviewed on the appeal of the commonwealth for the purpose of securing a uniform and correct administration of justice. *Ibid.* 560

Husband and Wife.

HUSBAND AND WIFE—

1. A covenant between husband and wife, that, in consideration of his receiving a sum of money devised to her by her father, he would secure the money to her separate use, and, if she died childless, it should go to her heirs, cannot be enforced after her death. *Pope v. Shanklin* 230
2. A contract between husband and wife for the benefit of third persons, to whom the husband is under no legal or moral obligation, is void. *Ibid.* 230
3. The husband takes the personalty by survivorship. *Ibid.* . . . 230
4. Where a husband finds it necessary to sell, and does sell land to pay purchase-money due thereon, although he sells more than will pay the lien upon it, if he sells in good faith his widow is not entitled to dower in any part of the land. *Melone, &c., v. Armstrong.* 248
5. The will creates in Mrs. Brashears a separate estate. *Hickman v. Brashears, &c.* 258
6. The power to sell the separate estate of the wife does not include the power to mortgage for the debts of the husband. *Ibid.* . . . 258
7. The real estate of a *feme covert* will be subjected to the payment of a note executed by her for necessities for herself and the members of her family, even where the title to the property is acquired by the *feme sole* subsequent to the creation of the debt. *Singer Manufacturing Company v. Harned, &c.* 279
8. A sewing-machine held to be necessary for herself and family. *Ibid.* 279
9. The husband did not pay any part of the purchase price for the land, but the whole of it was paid by the wife with the proceeds of her land and distributable share in her father's estate, the husband agreeing that the title should be made directly to her. *Campbell, &c., v. Campbell's trustee.* 395
10. Failing to have the title made to her, his conveyance afterwards to Campbell, and the conveyance of the latter to the wife, will be upheld in equity against the husband's creditors. *Ibid.* . . . 395
11. The contract between the husband and wife was post-nuptial, in which the husband became the trustee for his wife for a meritorious consideration. *Ibid.* 395
12. Husband and wife join in a conveyance of the wife's real estate to her sister, with the object of having it reconveyed by her to the wife, with power to dispose of it by will or otherwise, and it was so conveyed. The wife devised it to her husband. *Parrott, &c., v. Kelley, &c.* 490
13. The title passed by the devise. *Ibid.* 490
14. Before a married woman can successfully demand the power to trade and do business as a *feme sole*, it must appear either that she

Husband and Wife. Infants.

HUSBAND AND WIFE—Continued.

- has property, or a trade, calling, employment, or business, by which she can acquire property that calls for protection, under which she may enjoy the benefits of the one and the fruits of the other. *Franklin, ex parte* 497
15. The statute was enacted not for the benefit of certain classes of married women, but for all alike. *Ibid.* 497
16. A settlement made in good faith by the husband upon his wife, in the execution of an antenuptial contract, in writing, although void at law, will be sustained by the chancellor. *Sanders, &c., v. Miller, &c.* 517
17. Marriage is a good consideration for such a contract and settlement, and if made in good faith, the settlement will not be disturbed at the instance of creditors. *Ibid.* 517
(See *Contracts*.)

INDICTMENT—

1. The indictment is sufficient. *Salisbury v. Commonwealth.* . . 425.
2. The motion to compel appellee to elect upon which count of the indictment it would proceed was properly overruled. *Ibid.* . 425
3. "Intimidating, alarming, and disturbing any person," &c., denounced in section 2 of the act, entitled "An act to amend chapter 28, Revised Statutes," approved April 11, 1873, imply the use of physical force or menace, and involve a breach of the peace. *Embry v. Commonwealth.* 439
4. The indictment is insufficient. *Ibid.* 439
5. It is no objection to an indictment that the time of committing an offense is laid on the same day it is presented to the court and filed, provided it alleges that the offense was committed before the time of finding it. *Commonwealth v. Miller.* 451
6. A person may in the same indictment be charged with more than one violation of the "local option" law, but each offense must be specially charged, and the statement of the circumstances of each case be direct and certain. *South v. Commonwealth.* 493
7. A person who sells liquor for himself or another, or authorizes another to sell for him, may be guilty of violating this law; but he is not guilty if the sale be made by another although done in his presence and at his solicitation, unless he be the owner of the liquor sold. *Ibid.* 493
8. It is not necessary that the indictment under this act should allege the want of license. *Ibid.* 493

INFANTS—

1. An infant may appeal from a judgment of the circuit court to this court at any time during his minority, although two years have elapsed since the judgment. *Moss v. Hall.* 40.

 Infants. Injunctions.

INFANTS—Continued.

2. Having the right of appeal within one year after their majority, they may exercise the right at any time after the rendition of the judgment until the time mentioned. *Ibid* 40
3. A guardian is appointed for an infant at the domicile of her father at his death in Kentucky. The infant is taken out of this state without the consent of the guardian, and carried to Texas. A guardian selected by her in Texas after she is fourteen years of age cannot sue the guardian in Kentucky for rents of the infant's lands, collected by him here. *Munday, &c., v. Baldwin*. . . 121
4. The infant having a guardian in Kentucky is not a non-resident of the state, as she could not consent to leave it, and the court in Texas had no jurisdiction to appoint another guardian, or to displace the guardian in this state. The infant's domicile is in this state. *Ibid*. 121
5. The chancellor has the power to direct the conversion of the property of an infant when her interest requires it, if it can be so done as not to change the nature of the property, nor its descendible quality. *Thomson, &c., v. Pettibone* 319
6. In a case authorizing it, the court will order that the conversion be made under proper restrictions. *Ibid* 319

INFANTS' REAL ESTATE—

1. The act of 1878, directing that before land is sold it shall be valued, and if it sell for less than two thirds of its value, shall be liable to redemption, has no application to a sale of land made by judgment of a court upon the petition of a guardian under article 3, chapter 63, General Statutes. *Wooldridge v. Jacobs' gd'n* . . 250
2. There is no redemption in such cases. *Ibid*. 250

INJUNCTIONS—

1. A court of equity has power to restrain the collection of an illegal tax. *Gates v. Barrett, &c.* 295
2. In granting injunctions, courts of equity are not confined to the grounds specified in the Civil Code. *Ibid* 295
3. On a motion to dissolve an injunction upon the whole case the court is not bound to take the answer as true. When such a motion is made and submitted for judgment, it means a judgment whether or not the injunction shall be dissolved and no more. *Simrall, &c., v. Grant, &c.* 435
4. Where a suit is instituted to settle a decedent's estate, and the creditors, as provided by section 436 of the Code, are enjoined from suing on the demands except in that proceeding, the time of the continuance of the injunction is not to be excluded in estimating the period limited for the commencement of an action by a creditor, as the injunction does not stay his action, but only prescribes where and how he shall proceed. *Biggs, &c., v. Lexington and Big Sandy Railroad*. 470

 Insolvency. Instruction..

INSOLVENCY—

1. A debtor, desiring to prefer his individual creditors to the exclusion of those to whom he was liable as surety merely, in order to accomplish that purpose, sold his property, and applied the proceeds to the payment of his individual debts. This, whether so intended or not, was an evasion of the act of 1856. *King, &c., v. Moody*, 63
2. Whenever the debtor contemplates insolvency, and, with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not obtain without such act of the debtor, it comes within the act of 1856. *Ibid.* 63
3. To obtain the benefit of the exception contained in the act of 1856, the mortgage must have been made in good faith. *Farmer v. Hawkins, &c.* 182
4. It must have been made to secure a debt or liability created simultaneously with it. *Ibid.* 182
5. It must have been recorded within thirty days after its execution. *Ibid.* 182
6. So long as a debtor remains solvent, no sale, mortgage, or assignment by him can be held to have been made in contemplation of insolvency, unless actual fraud be alleged and proved. *Griffith v. Cox, &c.* 562
(See *Partners and Partnership, Act of 1856.*)

INSTRUCTION—

1. The first and second instructions are erroneous. *Muldraugh's Hill, &c., v. Maupin.* 101
2. Appellant is only bound to exercise ordinary care. *Ibid.* . . . 101
3. Notice to a gate-keeper of appellant's that their bridge was out of repair was sufficient. *Ibid.* 101
4. The court erred in its instruction to the jury in regard to malice. *Salisbury v. Commonwealth.* 425
5. To instruct the jury that "plaintiff's testimony shows that deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by defendant's train by keeping off the track at crossing-time, and if he failed so to avoid the train," &c., is error. *Louisville, Cincinnati and Lexington Railroad Company v. Goetz.* . 442
6. It interferes with the province of the jury. *Ibid.* 442
7. It requires that all care and caution be exercised by the deceased, but none by appellant. *Ibid.* 442
8. While it is the duty of persons crossing or attempting to cross a railroad track to exercise proper care and caution, it is also the duty of the employes of the railroad, or those in charge of the train, to exercise such care and precaution at such places as to prevent injury to those traveling on public highways. *Ibid.* 442

Instruction. Insurance, Life. ¹

INSTRUCTION—Continued.

9. The duty in this regard is reciprocal, and the court should have so instructed the jury. *Ibid* 442
10. The fifth instruction for appellee is error. *Minton v. Commonwealth*. 461
11. Whenever a person is in imminent danger of great bodily harm, or it is being inflicted upon him, whether it endanger his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment to be necessary to repel or deliver himself from it, unless by his own wrongful act he makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it upon him. *Ibid* 461
12. The third instruction, taken in connection with the fifth, excludes appellant from the benefit of the law applicable to the reckless use or discharge of the pistol without intending to injure any one thereby. An instruction should have been given to meet that view of the case. *Ibid* 461
13. The instructions objected to are error; but as they neutralize each other, they do not prejudice appellants. *Flood, &c., v. Pragoff, &c.* 607
(See *Criminal Law* Nos. 27, 29.)

INSURANCE BUREAU—

1. The resolution of the general assembly, adopted in 1840, does not authorize the Public Printer to publish any report, unless he be specially directed to do so by the legislature. *The Auditor v. Major*. 457
2. The act of March 10, 1870, and the resolution of March 12, 1878, expressly provide that the printing for the Insurance Bureau shall be paid for out of the fees and allowances received by the Commissioner under the law creating the Bureau. *Ibid* . . . 457
3. The object of the act establishing the Insurance Bureau is that it should be self-sustaining. *Ibid* 457

INSURANCE, LIFE—

1. The word "child" does not ordinarily embrace grandchild, but should be so construed where the manifest intention of the maker of the instrument would otherwise be defeated or the instrument rendered inoperative, or where other words show that the word was used in a more extended sense than that in which it is ordinarily used. *Duvall, &c., v. Goodson*. 224
2. As used in section 11 of the charter of the Kentucky Masonic Insurance Company, which provides that, upon the death of a member intestate without widow or child, the fund created by the charter shall vest in the company, the word "child" embraces grandchild, as to hold otherwise would be to defeat the manifest intention of the members of the company. *Ibid* 224

Insurance, Life. Interest.

INSURANCE, LIFE—Continued.

3. Under the charter, the personal representative of a deceased member can never take any interest in the fund arising from the membership of the decedent. *Ibid* 224
4. The company and one of its members cannot, by any stipulation in the certificate of membership, defeat the rights of those whom the charter declares to be beneficiaries. *Ibid*. 224
5. The charter gives the member a mere power of appointment in case he has neither wife or child, and, having no personal interest in the fund, it does not pass under a will disposing of all his estate, unless specifically mentioned. *Ibid* 224
6. A life policy for the benefit of the family of the person procuring it is in the nature of a will, and, as far as possible, should be so construed. *Ibid* 224
7. The retention of Johnson's note by appellee as its property, after the request had been made that it issue a paid-up policy, was sufficient evidence of further grace, and a determination to demand the payment thereof. *Johnson v. Southern Mutual Life Insurance Company*. 403
8. Inasmuch as appellee did not notify Johnson of the forfeiture of his policy, and did not offer to surrender his note, he had the right to treat the action of appellee as a waiver of the forfeiture and a continuance of the credit extended to him for the premium embraced in part in the note. *Ibid* 403
9. In order to inflict a forfeiture, the company is required to adhere inflexibly to the contract and its modifications, and they must not attempt to secure profits which may result from the variation of its terms and the inability of the assured to comply with the added or altered conditions. *Ibid* 403
10. The offer to surrender the original policy and the demand for a new and paid-up policy were made within a reasonable time. *Ibid* 403

INTEREST—

1. Sec. 4, art. 2, chap. 60, title "Interest and Usury," was repealed by the act of March 2, 1878. It was in the nature of a penalty. *Johnson v. Utley* 72
2. After the repeal of this section the obligee might recover legal interest upon his demand, although the obligation contained usury. *Ibid*. 72
3. Where a note is executed for land, and is not to bear interest until after maturity, the interest stipulated for is no part of the price of the land, but is for forbearance. *McCann's ex'rs v. Bell* . . . 112
4. Unless such note is verified and authenticated as required by the statute, and demanded of the executor or administrator within a year after his appointment, no interest arising after decedent's death can be recovered. *Ibid* 112

Interest. Jurisdiction.

INTEREST—Continued.

5. The court erred in sustaining the demurrer to appellant's answer. *Ibid.* 112
6. Oral evidence is competent to prove that notes due at a specified time were, by agreement, not to bear interest after maturity. *Elliott v. Elliott's adm'r.* 277
7. The evidence of the alleged agreement is not sufficient to establish it. *Ibid.* 277
8. The principal of the funds of the ward, or such part as is necessary, may be used by the guardian when the ward is of such tender years or infirm health that he cannot be apprenticed, or no suitable person will take him as such for nurture and education. *Campbell v. Golden* 544

JOINT TENANTS—

1. When houses situate upon joint property are falling to decay, and one tenant out of his own means makes reparation, he is not only entitled to contribution, but has a lien on the interests of his co-tenants, especially if they refuse, or, being under disability, are unable to consent to bear their share of the expense. *Alexander v. Ellison* 148

JUDGMENTS—

1. In a suit against defendants upon a joint contract, one being resident the other a non-resident, a several judgment may be rendered against the resident served with process. *Moore v. Estes.* . . . 282
2. Where the collection of an illegal tax is restrained, a judgment against the officer for the cost of the proceeding is proper, although he may have acted in perfect good faith. *Gates v. Barrett, &c.* 295

JUDICIAL TRIBUNAL. (See *County Court.*)

JURISDICTION—

1. When a road case is taken to the circuit or common pleas court, it is an appeal upon the law and facts originating and heard in the county court, and no evidence can be heard other than that found in the bill of exceptions. *Smith v. McMeekin* 24
2. Original jurisdiction in road cases is in the county court. The appellate jurisdiction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired in the county court, and the action of the court below must appear by a bill of exceptions. *Ibid.* 24
3. The chancellor has the power to direct the conversion of the property of an infant when her interest requires it, if it can be so done as not to change the nature of the property, nor its descendible quality. *Thompson, &c., v. Pettibone* 319
4. In a case authorizing it, the court will order that the conversion be made under proper restrictions. *Ibid.* 319
(See *County Court, Injunction.*)

Jurors. Liens.

JURORS—

1. Appellee had no right to say to a juror "don't hang." It was an insult to the juror and a contempt of court. *Campbell v. Banister*. 205

JURY, GRAND—

See *Criminal Law*. 22

LAND—

1. The act of 1878, directing that before land is sold it shall be valued, and if it sell for less than two thirds of its value, shall be liable to redemption, has no application to a sale of land made by judgment of a court upon the petition of a guardian under article 3, chapter 63, General Statutes. *Wooldridge v. Jacob's gd'n*. 250
2. There is no redemption in such cases. *Ibid*. 250

LANDLORD AND TENANT—

1. The remedy given by chapter 66, article 2, section 26, General Statutes, is cumulative, and it is within the discretion of the party whose property has been wrongfully distrained by his landlord to declare under the statute, or pursue his remedy at common law. *Bell v. Norris*. 48
2. The double damages, or double the value of the property sold, provided for in this section, is in the nature of a penalty. *Ibid*. . . 48
3. If the plaintiff seeks to recover double damages for the wrongful seizure of his property, or double the value of his property wrongfully sold under a distress warrant, he must distinctly declare under the statute. He must recite the statute, or conclude to the damage of the plaintiff contrary to the form of the statute. *Ibid*. . . 48
4. A landlord has a superior lien upon the property of the tenant, specified in section 13, article 2, chapter 66, General Statutes, for one year's rent, due and to become due, against the creditors of the tenant, while such property remains upon the premises, and for fifteen days after its removal, whether the removal be accompanied with a fraudulent intent or not, and without regard to the manner of removal. *Stone v. Bohm Brothers & Co.*. . . . 141
5. Not so, however, against *bona fide* purchasers who take the property off the premises. *Ibid*. 141

LIENS—

1. A landlord has a superior lien upon the property of the tenant, specified in section 13, article 2, chapter 66, General Statutes, for one year's rent, due and to become due, against the creditors of the tenant, while such property remains upon the premises, and for fifteen days after its removal, whether the removal be accompanied with a fraudulent intent or not, and without regard to the manner of removal. *Stone v. Bohm Brothers & Co.*. . . . 141

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 Liens.

LIENS—Continued.

2. Not so, however, against *bona fide* purchasers who take the property off the premises. *Ibid* 141
3. Although a vendor may have a lien upon real estate conveyed by him to his son and daughter by deed of record, yet, if he announce to a third party that he had given them the land, and that she might safely loan them money, and secure her loan by a mortgage upon it, and upon the faith of his statement she makes the loan and takes a mortgage, his lien will be subordinated to hers for the payment of the mortgage debt. *Alexander v. Ellison, &c.* . . 148
4. A party will not be permitted by the chancellor to lead another to believe by his assurances that land is unencumbered, and induce another to loan money upon its security, and afterwards defeat the recovery of the money by asserting a lien of his own, in existence when he advised the loan. *Ibid* 148
5. When houses situate upon joint property are falling to decay, and one tenant out of his own means makes reparation, he is not only entitled to contribution, but has a lien on the interests of his cotenants, especially if they refuse, or, being under disability, are unable to consent to bear their share of the expense. *Ibid.* . . 148
6. If a debtor has a security to which he can resort for indemnity, if he be compelled to pay the debt, such security inures to the benefit of the creditor. *Ibid* 148
7. The assignee of notes for purchase-money for land, the lien being carried by the assignment, does not waive his lien by accepting personal security, unless it appears that he intended so to do. *Bradley v. Curtis, &c.* 327
8. The lien passed as an incident to the assignment. *Ibid.* . . . 327
9. As long as purchase-money can be traced, no matter how often the evidence of the debt be changed, the lien therefor cannot be defeated by a claim to a homestead. *Ibid* 327
10. A party who holds a mortgage upon property that is insufficient to satisfy all the liens upon it is entitled to contest the existence of mortgage liens asserted by others, although his debt may not be due, and although his mortgage may not have been executed until after the other mortgagees had instituted suit to enforce their liens. *Hart, &c., v. Hayden, &c.* 346
11. There being no such devise of the interest given to his sons by the deviser as amounts to a charge upon the estate to pay appellant's debt, he has no lien upon the lands conveyed by the devisees to *bona fide* purchasers and mortgagees. *Grotenkemper v. Bryson, &c.* 353
12. Where a railroad company has contracted with a subscriber to its capital stock to apply the subscription to the construction of a particular part of its road, a contractor who has done the work on that part of the road under a contract with the company has no lien on

 Liens. Louisiana.

LIENS—Continued.

- the subscription to secure the payment of his claim, unless he has contracted therefor, and the president and directors of the company are not liable for the appropriation of the subscription to the payment of other debts of the company so long as the subscriber does not complain. *Myer & Hay v. Dupont* 416
13. A mortgagor, by fraudulently concealing material facts, induces a mortgagee with a prior lien to release it and take a new mortgage, the latter believing that the property is unencumbered, and resulting in giving another mortgagee priority. *Farmers and Drovers' Insurance Company v. German Insurance Company* 598
14. Equity will restore the party defrauded to the benefit of his prior lien. *Ibid.* 598
 (See *Mechanics' Liens*.)

LIMITATIONS—

1. The plea of the statute of limitation as to the years 1869, 1870, and 1871, is good. *Ormsby, &c., v. City of Louisville* 197
2. When action barred by the lapse of five years from the discovery of the mistake as to quantity, if payment was made before that time. *Biggs, &c., v. Lexington and Big Sandy Railroad Company* 470
3. An action to recover dower is not only a suit for the "recovery of real property," but for a freehold estate therein. *Anderson's trustee v. Sterritt, &c.* 499
4. The suit is barred within fifteen years after the cause of action accrued. *Ibid.* 499
5. The possession of the vendees is adverse to the widow of the vendor. *Ibid.* 499
 (See *Mortgages, Executors and Administrators*.)

LIQUOR SELLING—

1. No penalty has been denounced against a person *not a merchant* for selling vinous or spirituous liquors when they are not drunk on the premises where sold, or adjacent thereto. *Commonwealth v. Wheeler* 284
2. Before a person is required to obtain a license to sell whisky, he must be engaged in merchandising, and in the sale of other things than spirituous liquors. *Ibid.* 284
 (See *Criminal Law*.)

LIS PENDENS—

1. When a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, the action of the latter is not a *lis pendens* until he has filed his cross-petition and had process issued. *Hart, &c., v. Haydon, &c.* 346

LOUISIANA. (See *Contracts*.)

Malice. Mortgages.

MALICE. (See *Instructions*.)**MANDAMUS—**

1. An appeal lies to the circuit court from the judgment of a court of claims, making to a county judge an allowance for his salary. *Ohio County Court v. Newton*. 267
2. A mandamus does not lie. *Ibid.* 267

MECHANICS' LIENS—

1. Under the mechanics' lien law applicable to the city of Louisville, the material men and mechanics asserting liens upon the building erected by Peyton and wife, upon the lot conveyed to them by the Louisville Building Association, have liens superior to the vendors for their work and materials; but having failed to record their liens as required by the statute, they lost their priority as against the Association. *Louisville Building Association v. Korb, &c.*, 190
2. Although the lien of Korb, by virtue of his mortgage, is superior to that of the mechanics and material men, on account of their failure to have their liens recorded before he loaned the money to Peyton and wife and took his mortgage, his lien is inferior to that of the Building Association, the vendor of the lot. *Ibid.* . . 190
3. The fact that the building was erected after the lot was conveyed to Peyton and wife does not affect the vendor's lien as against a mortgagee whose lien accrued after the house was built. *Ibid.* . . 190

MISFEASANCE—

1. Intoxication cannot be deemed a misfeasance in office. Misfeasance in office is the wrong-doing of an official act. It relates to official conduct, not to conduct as an individual. *Commonwealth v. Williams* 42

MISTAKE—

1. Taxes illegally assessed by the city of Louisville, by mistake of law, upon land used only for farming purposes, and paid to the collector by the owners, by mistake of both law and fact, may be recovered back from the city. *City of Louisville v. Anderson, &c.* 334

MORTGAGES—

1. To obtain the benefit of the exception contained in the act of 1856, the mortgage must have been made in good faith. *Farmer v. Hawkins, &c.* 182
2. It must have been made to secure a debt or liability created simultaneously with it. *Ibid.* 182
3. It must have been recorded within thirty days after its execution. *Ibid.* 182
4. A mortgage executed to secure an account, without any covenant therein to pay, is a mere incident to the demand, and cannot stand upon the footing of a written obligation to pay a debt. *Prewitt, &c., v. Wortham, &c.* 287

Mortgages. Negligence.

MORTGAGES—Continued.

5. The demand is barred in five years. *Ibid* 287
6. A party who holds a mortgage upon property that is insufficient to satisfy all the liens upon it is entitled to contest the existence of mortgage liens asserted by others, although his debt may not be due, and although his mortgage may not have been executed until after the other mortgagees had instituted suit to enforce their liens. *Hart, &c., v. Haydon, &c.* 346
7. When a mortgagee has sued to foreclose his mortgage, and made another mortgagee a defendant, the action of the latter is not a *lis pendens* until he has filed his cross-petition and had process issued. *Ibid* 346
8. If the fact that a claim is tainted with usury is disclosed by the record, the chancellor will purge the claim, although the debtor may refuse to make such a defense. *Ibid* 346
9. A mortgagor, by fraudulently concealing material facts, induces a mortgagee with a prior lien to release it and take a new mortgage, the latter believing that the property is unencumbered, and resulting in giving another mortgagee priority. *Farmers and Drovers' Insurance Co. v. German Insurance Co.* 598
10. Equity will restore the party defrauded to the benefit of his prior lien. *Ibid* 598

MOTIONS—

1. A motion to dismiss a petition, on the ground that it does not contain a cause of action, or that there is a misjoinder of parties, is not the practice. The Code provides otherwise. *Hunt, &c., v. Seamonin, &c.* 271

NEGLECT—

1. Where the defense is contributory negligence, the proper question for the jury is, whether the damage was caused entirely by the negligence of the defendant, or whether the person injured so far contributed to the injury by his own negligence that, but for it, the injury would not have occurred. *Kentucky Central Railroad Co. v. Thomas' adm'r.* 160
2. Contributory negligence is a defense that confesses and avoids the plaintiff's case, and must be made out by showing not only that plaintiff was guilty of negligence, but that it co-operated with defendant's negligence to produce the injury. *Ibid* 160
3. Ordinarily, it is the duty of a conductor to warn a passenger known to be occupying a dangerous position, and to cause him to go into a passenger car, and his failure to do so may be equivalent to the consent of the company that the passenger may occupy that position. If the passenger takes his place in the baggage, mail, or express car, without the knowledge or consent of the conductor, he will not be permitted to excuse himself upon the ground that the

 Negligence. Non-Resident.

NEGLIGENCE—Continued.

- conductor ought to have discovered him and ordered him out.
Ibid 160.
4. Railroad companies are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. *Ibid* 160
5. The court erred in instructing the jury that no fault on the part of the intestate which did not contribute to the wrecking of the train would authorize them to find for the defendant. *Ibid* 160.
 (See *Railroads*.)

NEGRO JURORS—

1. Jury commissioners are not bound to select negro jurors. All that the accused can claim is, that no citizen otherwise competent shall be excluded by law on account of race or color. *Haggard v. Commonwealth* 366.
2. The proper way in which to take advantage of an irregularity in the summoning or formation of a grand jury is by motion to set aside the indictment, and if no such motion is made, the irregularity is waived. So also any irregularity in the summoning of a petit jury is waived by a failure to challenge the panel. *Ibid*. 366
3. The right of a party to be tried by a jury selected without discrimination on account of race or color is a right which may be waived. *Ibid* 366

NEGROES—

(See *Criminal Law*.)

NON-RESIDENT—

1. By section 445, Myers' Code, it is not required that it shall appear upon the order-book that a motion was formally made by the non-resident to set aside the judgment against him. Where, as in this case, he has given security for costs, and filed a pleading asking that the judgment be set aside, a previous appearance and motion by him for a new trial is necessarily implied. *Barbee v. Fox, &c.* 589.
2. When a non-resident, within five years after the rendition of a judgment for the sale of his land, appears and gives security for costs, and is admitted to make defense, section 445, Myers' Code, imperatively requires that the case shall be re-tried, and upon the re-trial the court may confirm the former judgment, modify it, or set it aside. *Ibid*. 589
3. The charter of the city of Louisville of 1851 provided that a decree directing a sale of the land of a non-resident to satisfy the lien of a contractor should make provision for the redemption of the property at any time within three years. The decree in this case did so provide, but the sale was confirmed absolutely, and a conveyance ordered to be made to the purchaser immediately, he

Non-Resident. Office and Officers.

NON-RESIDENT—Continued.

being in possession. The order of confirmation was, on motion of the heirs of the non-resident made within five years, set aside, but the sale was again confirmed, and three years allowed in which to redeem. *Held*—1. That the reservation in the judgment of the right to redeem did not obviate the necessity of reserving that right in the order of confirmation. 2. The order of confirmation should have been modified and not set aside, but appellants were not prejudiced by the action of the court. 3. The limitation of three years begins to run only from the date of the last order of confirmation. *Ibid* 589

4. Under the charter the court had no right to require appellees, as a condition of the right to redeem, to pay taxes levied previous to the sale. *Ibid* 589

(See *Executors and Administrators*.)

NO PROPERTY, RETURN OF. (See *Bill of Discovery*.)NOTICE. (See *Amendments*.)

NOVATION—

1. The mere change of the payee or of a part of the obligors is not a payment of usury, but it is the creation of a new contract, and discharges the obligors on the old obligation; and if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted. *Fitzpatrick, &c., v. Apperson's ex'x.* 272

NULLA BONA—

1. A suit instituted for the purpose of having conveyances set aside as voluntary and made to hinder and delay creditors, cannot be maintained without a judgment and return of *nulla bona*. *Napper, &c., v. Yager, &c.* 241

(See *Assignment in Contemplation of Insolvency*.)

OFFICE AND OFFICERS—

1. One who has been elected to, and engages to serve the public in an official capacity, has no right voluntarily to unfit himself for the faithful and intelligent discharge of his duties, and the law-making power may provide for his punishment in any manner not prohibited by the constitution. *Commonwealth v. Williams*, 42
2. The constitution has designated the offenses for which certain public officers, including county judges, may be removed from office, and the legislature has no power to prescribe removal from office as a penalty for offenses not so designated. *Ibid*. 42
3. Nor can it, by declaring that a given offense shall be deemed one of a class of offenses for which an officer may be removed, make it of that class, and authorize the removal of an officer upon his conviction of such offense. *Ibid* 42

Office and Officers. Parties.

OFFICE AND OFFICERS—Continued.

4. Intoxication cannot be deemed a misfeasance in office. Misfeasance in office is the wrong-doing of an official act. It relates to official conduct, not to conduct as an individual. *Ibid* 42
5. Appellee being elected prosecuting attorney of the city court of Louisville on the first Monday in August, 1880, was entitled to hold the office from the first Monday in September, 1880. *McGee v. Gill* 106
6. Where no time is fixed at which the term of office is to begin, the party elected may enter upon the discharge of its duties when he receives his certificate and is qualified according to law. *Ibid*. 106
7. The term of appellee's predecessor expired the first Monday in September, 1880. *Ibid* 106
8. In this suit against a county judge for accepting insufficient sureties upon a guardian's bond, there is no averment that appellee knew the sureties were insolvent when they executed the bond, or that he had any reason to believe that their estate was insufficient to secure the ward. *Burdine, &c., v. Pettus*. 240
9. There is no averment that the evidence heard by appellee was insufficient to satisfy one of ordinary judgment that the sureties were insolvent, or that he failed to hear any proof on the subject. *Ibid*. 240
10. The petition is insufficient. *Ibid* 240
11. A contract by which the clerk of the Louisville chancery court transfers and assigns to a trustee for the benefit of appellant, in consideration of a debt due him, all the fees and emoluments of his office in the future, until the debt is paid, with conditions to pay deputies, &c., is void. *Field v. Chipley, &c.* 260
12. It is against public policy that such contracts be enforced. *Ibid*. 260
13. The Auditor has, under the statute, the right to look to the clerk for taxes on suits collected by him. The trustee will not be recognized as the person to receive them. *Ibid*. 260
(See *Vacancies*.)

PARTIES—

1. There is a manifest distinction between permitting a receiver to collect a judgment already rendered, and conferring upon him the right to institute an action in which he has no interest, for the purpose of recovering a judgment for the benefit of others. The parties in interest must sue. *Murrell's adm'r v. McAllister*. . 311
2. It was neither necessary nor proper that the executor should aver that he was able and willing to convey the title to the land sold by the decedent, as the will gave him no power to do it. *Phillips v. Breck's ex'r*. 465
3. The devisees were, in this state of case, necessary parties, and to authorize a judgment of sale against the vendee, it must be aver-

Parties. Petition.

PARTIES—Continued.

- red that they were able and willing to convey a good title to the vendee. *Ibid.* 465
(See *Pleading and Practice.*)

PARTNERS AND PARTNERSHIP—

1. Only the individuals composing a firm can be sued. They may be sued jointly or separately, whether they do business in one or any number of firm names. *Hunt, &c., v. Semonin, &c.* 271
2. In a contest between heirs, the use to which land bought by a partnership is applied does not necessarily determine the question as to whether it is to be treated as real or personal estate. *Holmes v. Self, &c.* 297
3. The test is the intention with which the purchase is made. *Ibid.* 297
4. H. G. & Co. executed their note to appellant for \$10,000, and two members of the firm also signed their individual names to the obligation. The firm and the individual members became insolvent, and made assignments for the benefit of their creditors. *Fayette National Bank of Lexington, &c., v. Kenney's assignee* 133
5. Appellant had no greater rights or equities than if the individual names of the members of the firm had never been signed to the note. *Ibid.* 133
6. If a creditor of a partnership has received his portion of the firm assets, his hands will be closed, and he must wait until the creditors of the individual members of the firm receive an equal amount with him. *Ibid.* 133
7. If the partnership creditors exhaust the assets of the partnership without being paid in full, the individual creditor must receive a like sum from the individual assets; and when this is done, the individual estate remaining will be distributed between all the creditors, partnership and individual, in proportion to the amount of their debts respectively. *Ibid.* 133

PAYMENT—

1. The agreement between appellee Doyle and Hines and wife for the exchange of real estate, the note from the latter to the former to be delivered by him to them as part of the contract, extinguished the note and all liens resulting therefrom. *Ryan v. Doyle* 363
2. The note could not be assigned by the obligee to the obligors. It was paid by the contract between them. *Ibid.* 363

PETITION—

1. It is as necessary to state a cause of action as to sustain it by proof. The absence of either prevents a recovery. *Murrell's adm'r v. McAllister* 311
2. The action against appellant is barred by the statute of limitations. *Ibid.* 311

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—

1. When a road case is taken to the circuit or common pleas court, it is an appeal upon the law and facts originating and heard in the county court, and no evidence can be heard other than that found in the bill of exceptions. *Smith v. McMeekin* 24
2. Original jurisdiction in road cases is in the county court. The appellate jurisdiction of the circuit or common pleas court is confined to a revision of the proceedings as they transpired in the county court, and the action of the court below must appear by a bill of exceptions. *Ibid* 24
3. The court erred in refusing to require appellee to elect which of the first two paragraphs of his petition he would prosecute. The third contains no cause of action. *Muldraugh's Hill, &c., v. Maupin* 101
4. Evidence of injury to appellee's child should not have been permitted; but as the jury were instructed that they should not find any damages on that account, the judgment should not be reversed therefor. Proof that another bridge was out of repair was error. *Ibid* 101
5. The professional opinion of a physician as to the extent of appellee's injuries was competent. *Ibid* 101
6. But the opinion of the witness as to the amount of damages appellee should recover was incompetent. *Ibid* 101
7. The first and second instructions are erroneous. *Ibid* 101
8. Appellant is only bound to exercise ordinary care. *Ibid* 101
9. Notice to a gate-keeper of appellant's that their bridge was out of repair was sufficient. *Ibid* 101
10. Every question presented upon an appeal must be taken to have been disposed of by the decision upon the appeal, unless it be expressly left open for further litigation. *Smith, &c., v. Brannin, &c.* 114
11. When an appeal presents two or more questions, and the members of this court are equally divided upon one or more of them, and the judgment is reversed upon other points where there is agreement, the opinion of the judges who agree with the court below in regard to the questions as to which an equal division exists, becomes the law of the case as to such questions. *Ibid* 114
12. The court below and this court, in the further progress of the case, are bound by it as though all the judges had concurred with the lower court. *Ibid* 114
13. After a return of "no property" upon an execution, the growing crop of the debtor may be subjected, by a proceeding in equity, to the payment of the debt before the first of October. *Farmers' Bank of Kentucky v. Morris, &c.* 157
14. Although a growing crop is not subject to execution until the first day of October, yet, under the 439th section of the Civil Code, a

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

- court of equity, upon the return of the execution, will subject the crop, with due regard to the rights of both creditor and debtor, before that time. *Ibid* 157
15. Where the defense is contributory negligence, the proper question for the jury is, whether the damage was caused entirely by the negligence of the defendant, or whether the person injured so far contributed to the injury by his own negligence that, but for it, the injury would not have occurred. *Kentucky Central Railroad v. Thomas' adm'r.* 160
16. Contributory negligence is a defense that confesses and avoids the plaintiff's case, and must be made out by showing not only that plaintiff was guilty of negligence, but that it co-operated with defendant's negligence to produce the injury. *Ibid* 160
17. Ordinarily, it is the duty of a conductor to warn a passenger known to be occupying a dangerous position, and to cause him to go into a passenger car, and his failure to do so may be equivalent to the consent of the company that the passenger may occupy that position. If the passenger takes his place in the baggage, mail, or express car, without the knowledge or consent of the conductor, he will not be permitted to excuse himself upon the ground that the conductor ought to have discovered him and ordered him out. *Ibid* 160
18. Railroad companies are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. *Ibid* 160
19. The court erred in instructing the jury that no fault on the part of the intestate which did not contribute to the wrecking of the train would authorize them to find for the defendant. *Ibid* 160
20. An allegation that the ordinances set forth in the petition "were in all respects published as required by law," is insufficient. *Ormsby, &c., v. City of Louisville* 197
21. A publication of the levy ordinances of the city of Louisville on Sunday, and no other day, before seeking to enforce them, is not such a publication as the city charter requires or the law of this state approves. Sunday is not a judicial day, nor is it a day upon which any work, labor, or calling can be legally pursued, unless of necessity or charity. Such publication is of itself a violation of law, and no citizen, by any law of this state, is bound to read or take notice of it. *Ibid* 197
22. Before the contents of the two newspapers could lawfully be proven, their absence should have been accounted for, either by proving their loss or the inability of the appellee, after a *bona fide effort*, to obtain them. *Ibid* 197
23. The fact that the notices required by the levy ordinances were published should have been distinctly alleged and proved. *Ibid.* 197

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

24. The description and valuation of the lots sought to be taxed are sufficient. *Ibid.* 197
25. The plea of the statute of limitations as to the years 1869, 1870, and 1871, is good. *Ibid.* 197
26. One whose house has been set on fire may, with proper precaution and without malice, tell his family his suspicions as to who did it, and, so doing, will not be liable to an action by a person wrongfully accused. *Campbell v. Bannister.* 205
27. The fact that he repeated the accusation to others may be given in evidence to show that the communication to his family was malicious. *Ibid.* 205
28. A new assignment re-states, in a more minute and circumstantial manner, the cause of action. It is in the nature of a new petition. *Ibid.* 205
29. Evidence of appellant's bad character was admissible, but only such witnesses as knew his reputation were competent. Evidence as to particular facts is not competent. *Ibid.* 205
30. Appellee had the right to testify, and state that when he told his wife appellant burned his house, he told her not to speak of it. *Ibid.* 205
31. Appellee is not restricted, in proof of bad character, to such persons as he had heard speak of appellant. *Ibid.* 205
32. Appellee had no right to say to a juror "don't hang." It was an insult to the juror and a contempt of court. *Ibid.* 205
33. In this suit against a county judge for accepting insufficient sureties upon a guardian's bond, there is no averment that appellee knew the sureties were insolvent when they executed the bond, or that he had any reason to believe that their estate was insufficient to secure the ward. *Burdine, &c., v. Pettus.* 240
34. There is no averment that the evidence heard by appellee was insufficient to satisfy one of ordinary judgment that the sureties were insolvent, or that he failed to hear any proof on the subject. *Ibid.* 240
35. The petition is insufficient. *Ibid.* 240
36. A suit instituted for the purpose of having conveyances set aside as voluntary and made to hinder and delay creditors, cannot be maintained without a judgment and return of *nulla bona.* *Napper, &c., v. Yager, &c.* 241
37. The traverse bond was defective. *Alderson v. Trent.* 259
38. It was the duty of the court, under section 632, Civil Code, to allow appellant, within a reasonable time, to execute a new and sufficient bond. *Ibid.* 259
39. An appeal lies to the circuit court from the judgment of a court of claims, making to a county judge an allowance for his salary. A mandamus does not lie. *Ohio County Court v. Newton.* 267

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

40. A motion to dismiss a petition, on the ground that it does not contain a cause of action, or that there is a misjoinder of parties, is not the practice. The Code provides otherwise. *Hunt, &c., v. Semonin, &c.* 271
41. Notice that the plaintiff will amend his petition is only required where he amends without leave of the court, and within less than five days before the term at which the defendant must answer. *Ibid.* 271
42. Only the individuals composing a firm can be sued. They may be sued jointly or separately, whether they do business in one or any number of firm names. *Ibid.* 271
43. As no motion was made to compel appellees to elect on which cause of action they would proceed, the *assignment of error in that regard cannot be considered.* *Ibid.* 271
44. In a suit against defendants upon a joint contract, one being resident the other a non-resident, a several judgment may be rendered against the resident served with process. *Moore v. Estes* . . . 282
45. Although the court below erred in adjudging the costs against the non-resident to be paid by the resident defendant, the error is too insignificant to reverse upon it. *Ibid.* 282
46. The president and directors of a corporation, having the power to institute an action, have the power to dismiss it. *Shawhan, &c., v. Zinn, &c.* 300
47. In order to enable a stockholder to sue for the corporation, or his associate stockholders, where the rights of the corporation are involved, he must allege that the directors decline to sue, or refuse to permit him to sue in the name of the corporation, and the corporation must be a party plaintiff or defendant. *Ibid.* 300
48. The failure to make the corporation a party is not a mere defect of parties, to be taken advantage of by special demurrer, but leaves the stockholder without a cause of action, the party entitled to the relief not being before the court. *Ibid.* 300
49. If the plaintiff fails to make the corporation a party, it is not proper for the court to require him to do so, and his action should be dismissed absolutely. *Ibid.* 300
50. There is a manifest distinction between permitting a receiver to collect a judgment already rendered, and conferring upon him the right to institute an action in which he has no interest, for the purpose of recovering a judgment for the benefit of others. The parties in interest must sue. *Murrell's adm'r v. McAllister* . . . 311
51. It is as necessary to state a cause of action as to sustain it by proof. The absence of either prevents a recovery. *Ibid.* 311
52. The action against appellant is barred by the statute of limitations. *Ibid.* 311

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

53. Taxes illegally assessed by the city of Louisville, by mistake of law, upon land used only for farming purposes, and paid to the collector by the owners, by mistake of both law and fact, may be recovered back from the city. *City of Louisville v. Anderson, &c.*, 334
54. Where a party "has his day" in court to litigate a demand, but instead of doing so, voluntarily pays it, he is without remedy. *Ibid.* 334
55. But, being compelled either to pay the taxes or suffer his property to be sold by the collector, he has his action against the city to recover back the money wrongfully demanded by the agent of the city. *Ibid.* 334
56. Failing to rejoin to the reply of appellees that they did not discover their mistake until a fixed period, the averment must be taken as true. *Ibid.* 334
57. The court erred in sustaining the demurrer to the petition. *Bohon, &c., v. Barrett's ex'r.* 378
58. Where a bond has been executed for the forthcoming of property taken under attachment, and the property is not more than sufficient to satisfy the prior liens upon it, subject to which the attachment was levied, the obligors in the bond are liable for nominal damages only for their failure to produce the property. *Hayman & Co. v. Hallam* 389
59. Although the obligation may be "to satisfy the judgment and deliver the property," it should be construed as if the disjunctive conjunction were used, as found in section 214 of the Code. *Ibid.* 389
60. To enable a defendant to have a judgment by default set aside on the ground of surprise, he must present a sufficient defense to the action. *Ibid.* 389
61. A trial in chancery is not ended until final judgment is recorded, and under Myers' Code, which provided that exceptions to the competency of depositions might be filed at any time during the progress of the trial, such exceptions were in time, although not filed until after the court announced its conclusion from the bench. *Cooksey, &c., v. Cassidy, &c.* 392
62. In the absence of an objection to the filing of the exceptions, appellants cannot complain of the action of the court in permitting them to be filed. *Ibid.* 392
63. There must be some impediment to the remedy at law before the chancellor can be invoked to enjoin a sale of personal property levied on to satisfy an execution. *Simrall, &c., v. Grant, &c.*, 435
64. In a controversy between a trustee and *cestui que trust* a court of equity will entertain jurisdiction. *Ibid.* 434
65. On a motion to dissolve an injunction upon the whole case the court is not bound to take the answer as true. When such a motion is

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

- made and submitted for judgment, it means a judgment whether or not the injunction shall be dissolved and no more. *Ibid.* . . . 434
66. When an action has been filed by a personal representative to settle an estate under chapter 3, title 10, Civil Code, it is in the sound discretion of the chancellor to prescribe the time within which creditors may present their demands proved and verified according to law. *Gray's ex'r v. Lewis, &c.* 453
67. The object of the legislature is not to discriminate against non-resident creditors, but to facilitate the settlement and disposal of estates of persons not resident at the time of their death. *Ibid.* 453
68. The limitation of two years is the period within which the personal representative is required to dispose of such estates. But while assets remain in his hands creditors elsewhere, as well as in Kentucky, may, even after two years, prove and demand their claims against the estate. *Ibid.* 453
69. The object of sections 641 and 643, Civil Code, is to simplify proceedings under executions, and to prevent circuitry of actions. *Chisholm v. Gooch* 468
70. The claimant or purchaser of personal property sold under execution has his action upon the indemnifying bond executed by the plaintiff, or he may sue the officer upon his official bond, if he has made himself liable by failing to take good security and return the bond as directed in these sections. *Ibid.* 468
71. A party to the action may, in the discretion of the court, withdraw any pleading filed by him, where it works no injury to his adversary. *Humphrey v. Hughes' gd'n* 487
72. In an action by the assignee against the assignor of a note, it is necessary to aver the consideration paid for the assignment. *Ibid.* 487
73. The recovery is limited to the amount actually paid. *Ibid.* . . 487
74. A plaintiff, by joining issue upon a counter-claim of the defendant, waives all right to object to that pleading, because the caption does not contain the words "answer and counter-claim," as required by subsection 4, section 97, Civil Code. That section applies where the plaintiff has failed to reply. *Cason v. Cason* . . . 558
75. In order to enable a defendant to plead, as a counter-claim or set-off, a claim against the estate of a decedent, it must be verified and proved in the manner required by law in the case of claims sued upon by original action, but demand may be dispensed with. *Warfield, &c., vs. Gardner's adm'r, &c.* 583
76. An affidavit in the body of the answer is not sufficient. The claim should be verified and proved in the manner required by law and filed with the answer. *Ibid.* 583
77. The allegation in the petition that the plaintiffs were, by an order of the Hardin county court, appointed administrators, and quali-

Pleading and Practice in Civil Cases.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

- fied as such, is a substantial compliance with section 122, Civil Code, as the law raises the presumption that the order was *duly* made. *Ibid* 583
78. The failure of the petition to state facts showing that the Hardin county court had jurisdiction to make the order should have been taken advantage of by special demurrer. *Ibid* 583
79. By section 445, Myers' Code, it is not required that it shall appear upon the order-book that a motion was formally made by the non-resident to set aside the judgment against him. Where, as in this case, he has given security for costs, and filed a pleading asking that the judgment be set aside, a previous appearance and motion by him for a new trial is necessarily implied. *Barbee v. Fox, &c.* 588
80. When a non-resident, within five years after the rendition of a judgment for the sale of his land, appears and gives security for costs, and is admitted to make defense, section 445, Myers' Code, imperatively requires that the case shall be re-tried, and upon the re-trial the court may confirm the former judgment, modify it, or set it aside. *Ibid* 588
81. The charter of the city of Louisville of 1851 provided that a decree directing a sale of the land of a non-resident to satisfy the lien of a contractor should make provision for the redemption of the property at any time within three years. The decree in this case did so provide, but the sale was confirmed absolutely, and a conveyance ordered to be made to the purchaser immediately, he being in possession. The order of confirmation was, on motion of the heirs of the non-resident made within five years, set aside, but the sale was again confirmed, and three years allowed in which to redeem. *Held*—1. That the reservation in the judgment of the right to redeem did not obviate the necessity of reserving that right in the order of confirmation. 2. The order of confirmation should have been modified and not set aside, but appellants were not prejudiced by the action of the court. 3. The limitation of three years begins to run only from the date of the last order of confirmation. *Ibid* 588
82. Under the charter the court had no right to require appellees, as a condition of the right to redeem, to pay taxes levied previous to the sale. *Ibid* 588
83. It was neither necessary nor proper that the executor should aver that he was able and willing to convey the title to the land sold by the decedent, as the will gave him no power to do it. *Phillips v. Breck's ex'r* 465
84. The devisees were, in this state of case, necessary parties, and to authorize a judgment of sale against the vendee, it must be

Pleading and Practice in Civil Cases. Preference of Creditors.

PLEADING AND PRACTICE IN CIVIL CASES—Continued.

- averred that they were able and willing to convey a good title to the vendee. *Ibid.* 465
85. If the devisees be infants, or refuse to convey, an averment by the executor of the contract, the character of the title the testator bound himself to make, and that the infants or those refusing to convey had a good title, or such title as the testator agreed to convey, must be made. *Ibid.* 465
86. Where a deed does not contain any warranty of quantity, the remedy of a grantee for a deficit is based on an implied assumption of the grantor to refund the money paid by mistake: *Biggs, &c., v. Lexington and Big Sandy Railroad Company.* 470
87. An assignment of the warranties in a deed which does not contain any warranty of *quantity* does not carry with it the cause of action on the implied promise of the original vendor to render compensation for a deficit in the quantity of land. *Ibid.* 470
88. Such an action is barred by the lapse of five years from the discovery of the mistake as to quantity, if payment was made before that event. *Ibid.* 470
89. Where a suit is instituted to settle a decedent's estate, and the creditors, as provided by section 436 of the Code, are enjoined from suing on their demands except in that proceeding, the time of the continuance of the injunction is not to be excluded in estimating the period limited for the commencement of an action by a creditor, as the injunction does not stay his action, but only prescribes where and how he shall proceed. *Ibid.* 470
90. The verbal statement of the judge as to the effect of the failure of the grand jury to indict the accused at the first term has no legal significance. *Walker & Hubbard v. Commonwealth.* 292
91. Accused failed to appear at the first term in discharge of the bail-bond, and under the 93d section, Criminal Code, it was the duty of the court to direct that the fact be entered of record, and thereupon his bond was, as a matter of law, forfeited. *Ibid.* 292
92. His trial and conviction, afterwards did not affect the forfeiture of the bond. *Ibid.* 292

POSSESSION—

1. Section 62, Civil Code, has changed the rule in regard to possession of land lying in two counties. *Harlan, &c., v. Howard, &c.* . . 373

POWERS. (See *Wills.*)

PREFERENCE OF CREDITORS UNDER ACT OF 1856—

1. A debtor, desiring to prefer his individual creditors to the exclusion of those to whom he was liable as surety merely, in order to accomplish that purpose, sold his property, and applied the proceeds to

 Preference of Creditors. Publication.

PREFERENCE OF CREDITORS—Continued.

the payment of his individual debts. This, whether so intended or not, was an evasion of the act of 1856. *King, &c., v. Moody* . . . 63

2. Whenever the debtor contemplates insolvency, and, with the design to prefer one or more creditors, does an act which enables the favored creditor, through the forms of legal proceedings, to obtain a preference he could not obtain without such act of the debtor, it comes within the act of 1856. *Ibid.* 63

PRESUMPTION—

1. No application of this payment having been made by the sheriff, it is presumed that he made it in discharge of the balance due from him for the year 1874, and it must be so applied. *Helm, &c., v. Commonwealth* 67
2. It is not shown that he paid any part of the balance due for 1871 out of taxes collected for 1872, and the presumption is that he did his duty in the absence of proof to the contrary. *Ibid.* 67
3. A deed over thirty years old, unblemished by alterations, and produced by those whose custody affords a reasonable presumption that it is genuine, proves itself, the witnesses of the fact being presumed to be dead. *Harlan, &c., v. Howard, &c.* 373
4. The credibility of the evidence contained in such deeds belongs to the jury. *Ibid.* 373

PRIMA FACIE—

1. The mere possession of a promissory note is not *prima facie* evidence of ownership as against the payee or his personal representative. The burden of proof is on the claimant to show that his possession is rightful. *Gano v. McCarthy's adm'r.* 409

PUBLIC ADMINISTRATORS—

1. Although a public administrator resigns his office, he is still the representative of each and every estate committed to his hands before his resignation. He must administer such estates, and his sureties are bound for the faithful discharge of his duties as to each estate so committed to him. *Olsen's adm'r v. Rich.* . . . 244

PUBLICATION—

1. An allegation that the ordinances set forth in the petition "were in all respects published as required by law," is insufficient. *Ormsby, &c., v. City of Louisville* 197
2. A publication of the levy ordinances of the city of Louisville on Sunday, and no other day, before seeking to enforce them, is not such a publication as the city charter requires or the law of this state approves. Sunday is not a judicial day, nor is it a day upon which any work, labor, or calling can be legally pursued, unless of necessity or charity. Such publication is of itself a violation of law, and no citizen, by any law of this state, is bound to read or take notice of it. *Ibid.* 197

Public Printer. Receiver.

PUBLIC PRINTER—

1. The resolution of the general assembly, adopted in 1840, does not authorize the Public Printer to publish any report, unless he be specially directed to do so by the legislature. *The Auditor v. Major* 457
2. The act of March 10, 1870, and the resolution of March 12, 1878, expressly provide that the printing for the Insurance Bureau shall be paid for out of the fees and allowances received by the Commissioner under the law creating the Bureau. *Ibid.* 457
3. The object of the act establishing the Insurance Bureau is that it should be self-sustaining. *Ibid.* 457

PURCHASERS. (See *Lien*.)

RAILROADS—

1. To instruct the jury that "plaintiff's testimony shows that deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by defendant's train by keeping off the track at crossing-time, and if he failed so to avoid the train," &c., is error. *Louisville, Cincinnati and Lexington Railroad Company v. Goetz* . 442
2. It interferes with the province of the jury. *Ibid.* 442
3. It requires that all care and caution be exercised by the deceased, but none by appellant. *Ibid.* 442
4. While it is the duty of persons crossing or attempting to cross a railroad track to exercise proper care and caution, it is also the duty of the employés of the railroad, or those in charge of the train, to exercise such care and precaution at such places as to prevent injury to those traveling on public highways. *Ibid.* 442
5. The duty in this regard is reciprocal, and the court should have so instructed the jury. *Ibid.* 442

RAILROAD COMPANIES. (See *Negligence*.)

RAPE—

1. The statute under which appellant was indicted is intended to punish a person who detains a female against her will for the purpose of having carnal knowledge of her, and to create an offense less than that of rape. *Evans v. Commonwealth* 414

REAL ESTATE WHEN TREATED AS PERSONALTY. (See *Partner and Partnership*.)

RECEIVER—

1. The statute does not authorize the appointment of a receiver in such an action, except to take charge of such property as may be under the control of the person to whom the sale, mortgage, or assignment shall have been made, unless the property is in danger of being lost, removed, or materially injured; so where a mortgage does not pass the possession and control of the property

Receiver. Rents.

RECEIVER—Continued.

mortgaged, the court has no power to compel its surrender to a receiver before it is decided that the mortgage was made in contemplation of insolvency. *Griffith v. Cox, &c.* 562.

REDEMPTION—

1. The act of 1878, directing that before land is sold it shall be valued, and if it sell for less than two thirds of its value, shall be liable to redemption, has no application to a sale of land made by judgment of a court upon the petition of a guardian under article 3, chapter 63, General Statutes. *Wooldridge v. Jacob's guardian* 250
2. There is no redemption in such cases. *Ibid.* 250.
3. The bank and its assignees, by the receipt of a part of the money paid toward the redemption of the land, are estopped to demand a deed or to deny appellants' right to redeem. *Fitzpatrick, &c., v. Apperson's ex'x* 272.

RELEASE. (See *Sureties* No. 1.)

REMEDIES—

1. There must be some impediment to the remedy at law before the chancellor can be invoked to enjoin a sale of personal property levied on to satisfy an execution. *Simrall, &c., v. Grant, &c.*, 435
2. Where a deed does not contain any warranty of quantity, the remedy of a grantee for a deficit is based on an implied assumpsit of the grantor to refund the money paid by mistake. *Biggs, &c., v. Lexington and Big Sandy Railroad.* 470.
3. After the father of a bastard child has claimed the benefit of the insolvent debtor's oath, and an execution has been issued against him from the county court, and returned *nulla bona*, the circuit court has jurisdiction to enforce the collection of the judgment. *Brightwell v. Commonwealth* 537
4. The remedy for enforcing the judgment of the county court is not found alone in the statute in regard to bastardy. The chancellor has the power beyond the statute to compel the payment of the judgment. *Ibid.* 537

RENTS—

1. A widow suing to recover dower in land alienated by her husband during his life-time is entitled to recover rents from the institution of her action. *Magruder v. Smith* 512
2. She might, by amended petition, assert her claim to rents from the filing of her suit for dower. *Ibid.* 512
3. If she dies, her personal representative may sue for and recover the value of her rents from the institution of her original action for dower. *Ibid.* 512
4. A widow is entitled to one third of the rents and profits of her husband's dowable real estate from his death until dower is

Rents. Salaries.

RENTS—Continued.

- assigned, notwithstanding the existence of a vendor's lien. *Wilson, &c., v. Ewing, &c.* 549
5. The lien of a vendor is upon the land alone, and does not extend to the rents and profits. *Ibid* 549

RES GESTÆ—

1. That the party in possession of the note said at the time she assigned it that she had acquired it as a gift from the payee was not competent to establish the gift, nor as a part of the *res gestæ*. *Gano v. McCarthy's adm'r* 409

REVENUE AND TAXATION—

1. In general, movable property is to be assessed for taxation in the county of the owner's residence, and, having been assessed there, it is not assessable in another county. *Gates v. Barrett, &c.* 295
2. A court of equity has power to restrain the collection of an illegal tax. *Ibid* 295
3. In granting injunctions, courts of equity are not confined to the grounds specified in the Civil Code. *Ibid* 295
4. Where the collection of an illegal tax is restrained, a judgment against the officer for the cost of the proceeding is proper, although he may have acted in perfect good faith. *Ibid* 295
5. Taxes illegally assessed by the city of Louisville, by mistake of law, upon land used only for farming purposes, and paid to the collector by the owners, by mistake of both law and fact, may be recovered back from the city. *City of Louisville v. Anderson, &c.* 334
6. The act "authorizing the Auditor to appoint agents to attend to revenue matters," approved April 29, 1880, is constitutional. *Hoke v. Commonwealth* 567
7. The subject of the act is sufficiently expressed in the title. *Ibid* 567
8. The agent is a mere subordinate, and his term ends with that of the Auditor appointing him. *Ibid* 567
9. The act does not interfere with the duties of the assessor, but requires that to be done which he has omitted to do, and has no power to do, after the return of his books has been made to the county court. *Ibid* 567
10. The penalty is retrospective, and cannot be enforced. *Ibid* 567

ROAD CASES. (See *Jurisdiction*.)

SALARIES—

1. The general assembly has no power to reduce the salary of the judges of criminal courts nor of the vice chancellor of the Louisville chancery court before their terms of office expire, and the act of the general assembly, entitled "An act to amend chapter 95 of General Statutes, title 'Salaries,'" approved April 13, 1880, so attempting to reduce their salaries, is unconstitutional. *Perkins v. Auditor* 306

 Separate Estate. Statute Law.

SEPARATE ESTATE—

1. The will creates in Mrs. Brashears a separate estate. *Hirschman v. Brashears, &c.* 258
2. The power to sell the separate estate of the wife does not include the power to mortgage for the debts of the husband. *Ibid.* 258.

SETTLEMENT—

1. A settlement made in good faith by the husband upon his wife, in the execution of an antenuptial contract, in writing, although void at law, will be sustained by the chancellor. *Sanders, &c., v. Miller, &c.* 517
2. Marriage is a good consideration for such a contract and settlement, and if made in good faith, the settlement will not be disturbed at the instance of creditors. *Ibid.* 517

SHERIFFS—

1. T. A. McGill was sheriff of Breckinridge county for 1871 and 1872, with different sureties on each of his bonds. A settlement of his accounts for 1871 showed a balance due from him of \$2,407.31, which was carried over into his settlement for the levy of 1872. Between the two settlements he paid exceeding that amount to the commissioner of the county court. *Helm, &c., v. Commonwealth, &c.* 67
2. No application of this payment having been made by the sheriff, it is presumed that he made it in discharge of the balance due from him for the year 1871, and it must be so applied. *Ibid.* 67
3. It is not shown that he paid any part of the balance due for 1871 out of taxes collected for 1872, and the presumption is that he did his duty in the absence of proof to the contrary. *Ibid.* 67
4. The order of the county court, that the sheriff pay over the money to the commissioner, "to be applied to the purchase of county bonds," is no appropriation of the money. *Ibid.* 67
5. The orders of the county court giving the sheriff further time to pay the balance due from him was without consideration, and revocable, and therefore did not release his sureties. *Ibid.* 67

SLANDER—

1. One whose house has been set on fire may, with proper precaution and without malice, tell his family his suspicions as to who did it, and, so doing, will not be liable to an action by a person wrongfully accused. *Campbell v. Bannister* 205.

STATUTE LAW—

1. Where an alternative punishment is denounced by the statute for an offense, the jury should be instructed and required to fix the kind and extent of the punishment, within the limits prescribed by the law. *Herron v. Commonwealth* 38
2. It was error for the court, upon a verdict of guilty, to fix the punishment when it was in the alternative. *Ibid.* 38

 Statutes. Surety.

STATUTES. (See *Surety*.)

STREETS AND ALLEYS—

1. When land is laid off into lots, streets, and alleys, and lots are sold, each lot-owner has the right not only to use the streets as ways of ingress and egress, but also to have them thrown open to be used by the public in any manner consistent with the uses for which they are established. *Elizabethtown and Paducah Railroad Company v. Thompson, &c.* 52
2. The occupation and use of the street of a city or town as the site of a steam railroad, does not entitle owners of the fee adjacent thereto to the center of the street to compensation, as for property taken for public uses. *Ibid* 52
3. The report of the commissioners as to consequential damages will not be disturbed. *Ibid* 52
4. The court erred in awarding the writ of *habere facias* against the appellants. *Ibid* 52

SUBROGATION—

1. If a debtor has a security to which he can resort for indemnity, if he be compelled to pay the debt, such security inures to the benefit of the creditor. *Alexander v. Ellison, &c.* 148

SURETIES—

1. When a surety has been discharged from legal liability upon a written obligation, by its alteration without his consent, a subsequent promise by him to pay is not binding, unless made upon some new consideration. *Warren, &c., v. Fant's trustee.* 1
2. Words added upon the margin of an obligation, and above the signatures of the obligors, by an arrangement between the obligee and principal obligor, after the delivery of the writing, are to be deemed a part of the obligation, and, if added without the consent of the sureties, and their liability is thereby increased, they are released. *Ibid* 1
3. The orders of the county court giving the sheriff further time to pay the balance due from him was without consideration, and revocable, and therefore did not release his sureties. *Helm, &c., v. Commonwealth.* 67

SURETY—

1. In all cases of suretyship, in order that the act of one may bind another as surety, such act must, according to the statute, be done under authority in writing. *Billington v. Commonwealth* . . . 400
2. Section 85 of the Criminal Code does not apply to this case. *Ibid* 400
3. The commonwealth is bound by the statute as well as individuals. No exceptions are made. *Ibid* 400
(See *Contracts*.)

Survivor. Trusts and Trustees.

SURVIVOR—

1. The word survivor, in the absence of any explanation by the deviser in any part of the will, must be interpreted according to its literal meaning, and points to those who outlive the first devisee. *Bayless, &c., v. Prescott*. 252

SURVIVORSHIP. (See *Husband and Wife*.)TAXES. (See *Contracts*.)

TOWNS AND CITIES—

1. When land is laid off into lots, streets, and alleys, and lots are sold, each lot-owner has the right not only to use the streets as ways of ingress and egress, but also to have them thrown open to be used by the public in any manner consistent with the uses for which they are established. *Elizabethtown and Paducah Railroad Co. v. Thompson, &c.* 52
2. The occupation and use of the street of a city or town as the site of a steam railroad, does not entitle owners of the fee adjacent thereto to the center of the street to compensation, as for property taken for public uses. *Ibid* 52
3. The report of the commissioners as to consequential damages will not be disturbed. *Ibid*. 52
4. The court erred in awarding the writ of *habere facias* against the appellants. *Ibid*. 52

TRANSFER TO PREFER CREDITORS. (See *Debtor and Creditor*.)

TRAVERSE BOND—

1. The traverse bond was defective. *Alderson v. Trent* 259
2. It was the duty of the court, under section 682, Civil Code, to allow appellant, within a reasonable time, to execute a new and sufficient bond. *Ibid* 259

TRIAL. (See *Pleading and Practice*.)

TRUSTS AND TRUSTEES—

1. Property devised in trust, leaving it discretionary with trustee whether the beneficiary shall have any of the property devised, cannot be subjected to payment of debt of beneficiary. *Davidson's ex'r v. Kemper*. 5
2. The court erred in sustaining the demurrer to the petition. *Bohon, &c., v. Barrett's ex'rs* 378
3. The fourth clause of John W. Barrett's will creates a precatory trust in favor of appellant, Lillie Bohon, late Barrett. When she performed the requirements of the will, the executor had no discretion, but must pay to her the amount indicated by it. *Ibid*. 378
4. The discretion given to the executor is only as to the mode of expending the money for her benefit, and settling it upon her. *Ibid* 378

Trusts and Trustees. Usury.

TRUSTS AND TRUSTEES—Continued.

5. If such a trust exists in favor of the contractor, he cannot enforce it without alleging that a sufficient amount to pay his claim remains in the hands of the company after constructing the portion of the road to which the subscription was to be applied. *Meyer & Hay v. Dupont, &c.* 416
6. In a controversy between a trustee and *cestui que trust* a court of equity will entertain jurisdiction. *Simrall, &c., v. Grant, &c.*, 435

TURNPIKE COMPANIES—

1. The court erred in refusing to require appellee to elect which of the first two paragraphs of his petition he would prosecute. The third contains no cause of action. *Muldraugh's Hill, Campbells-ville and Columbia Turnpike Company v. Maupin* 101
2. Evidence of injury to appellee's child should not have been permitted; but as the jury were instructed that they should not find any damages on that account, the judgment should not be reversed therefor. Proof that another bridge was out of repair was error. *Ibid.* 101
3. The professional opinion of a physician as to the extent of appellee's injuries was competent. *Ibid.* 101
4. But the opinion of the witness as to the amount of damages appellee should recover was incompetent. *Ibid.* 101
5. The first and second instructions are erroneous. *Ibid.* 101
6. Appellant is only bound to exercise ordinary care. *Ibid.* . . . 101
7. Notice to a gate-keeper of appellant's that their bridge was out of repair was sufficient. *Ibid.* 101

USURY—

1. Section 4, article 2, chapter 60, title "Interest and Usury," was repealed by the act of March 2, 1878. It was in the nature of a penalty. *Johnson v. Utley* 72
2. After the repeal of this section the obligee might recover legal interest upon his demand, although the obligation contained usury. *Ibid.* 72
3. The mere change of the payee or of a part of the obligors is not a payment of usury, but it is the creation of a new contract, and discharges the obligors on the old obligation; and if the usury on the old debt be carried into the new contract, so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted. *Fitzpatrick, &c., v. Apperson's ex'x.* 272
4. If the fact that a claim is tainted with usury is disclosed by the record, the chancellor will purge the claim, although the debtor may refuse to make such a defense. *Hart, &c., v. Haydon, &c.*, 346

 Vacancies. Wills.

VACANCIES—

1. The Governor has no power to fill a vacancy in the office of a Judge of the Court of Appeals, unless the unexpired term shall be less than one year, in which case he may fill such vacancy by appointment 621

VENDOR'S LIEN—

1. A widow is entitled to one third of the rents and profits of her husband's dowable real estate from his death until dower is assigned, notwithstanding the existence of a vendor's lien. *Wilson, &c., v. Ewing, &c.* 549
2. The lien of a vendor is upon the land alone, and does not extend to the rents and profits. *Ibid* 549

VERIFICATION. (See *Decedent's Estate*.)

VOLUNTARY CONVEYANCES—

1. A suit instituted for the purpose of having conveyances set aside as voluntary and made to hinder and delay creditors, cannot be maintained without a judgment and return of *nulla bona*. *Napper, &c., v. Yeager, &c.* 241

WAIVER—

1. Inasmuch as appellee did not notify Johnson of the forfeiture of his policy, and did not offer to surrender his note, he had the right to treat the action of appellee as a waiver of the forfeiture and a continuance of the credit extended to him for the premium embraced in part in the note. *Johnson v. Southern Mutual Life Insurance Company* 403
2. A plaintiff, by joining issue upon a counter-claim of the defendant, waives all right to object to that pleading, because the caption does not contain the words "answer and counter-claim," as required by subsection 4, section 97, Civil Code. That section applies where the plaintiff has failed to reply. *Cason v. Cason* 558

WIDOW. (See *Homestead*.)

WILLS—

1. It is manifest that the widow of the deviser acquired only an estate for life in the lands devised to her by the second clause of the will. *Dehoney, &c., v. Taylor* 124
2. The power given to the executors by the seventh clause to sell and convey any portion of the deviser's estate must be construed with the other provisions of the will. *Ibid* 124
3. The meaning of the testator is, "the executors are vested with the title to sell certain tracts of land I have directed to be sold, without restriction or limitation; but the land devised to my wife is to be sold after her death, and the proceeds distributed as directed by me." *Ibid* 124

Wills.

WILLS—Continued.

4. His intention was to give her a home for life, and that after her death the land should be sold. *Ibid* 124
5. The widow had no authority to sell any greater interest than her life estate. *Ibid* 124
6. There is no evidence that appellants consented to or acquiesced in the sale of the lands by the widow. *Ibid* 124
7. The word survivor, in the absence of any explanation by the deviser in any part of the will, must be interpreted according to its literal meaning, and points to those who outlive the first devisee. *Bayless, &c., v. Prescott, &c.* 252
8. The will creates in Mrs. Brashears a separate estate. *Hirschman v. Brashears, &c.* 258
9. The power to sell the separate estate of the wife does not include the power to mortgage for the debts of the husband. *Ibid* 258
10. There being no such devise of the interest given to his sons by the deviser as amounts to a charge upon the estate to pay appellant's debt, he has no lien upon the lands conveyed by the devisees to *bona fide* purchasers and mortgagees. *Grotenkemper v. Bryson, &c.* 353
11. The executor had no authority, express or implied, to bind the devisees by his acknowledgment of appellant's demand in writing, so as to subject the devisees to its payment. *Ibid* 353
12. Appellant's demand is barred by the statute of limitations. *Ibid*. 353
13. Although a testator has no right to alter the laws of descent, he may designate and exclude from participation in his estate persons who would otherwise inherit. *Tabor, &c., v. McIntire, &c.* 505
14. The following paper, wholly written and signed by the testatrix, is held to be a valid will: "For sundry reasons and bad treatment, it is my will and wish that Boone Tabor shan't have any of my property, and Thomas McIntire, only through a responsible trustee, in the way of clothes and something to keep him from suffering." *Ibid* 505
15. The excluded heir being one of two children of a deceased sister of the testatrix, his brother is entitled to their mother's whole share to the exclusion of the brothers and sisters of the testatrix. *Ibid* 505
16. Thomas McIntire, a brother of the testatrix, is not entitled to a share absolutely, but a share should be invested for him by his trustee, so much of the interest to be used as may be required to furnish him annually with clothing, food, and shelter; and if the interest should not be sufficient for that purpose, the principal may be used as his annual necessities may demand. *Ibid* 505
17. The attestation of the subscribing witnesses to a will is to the genuineness of the testator's signature, and not as to the contents of

Wills. Witnesses.

WILLS—Continued.

- the paper. It is not necessary that they should know that the paper is a will. *Flood, &c., v. Pragoff, &c.* 607
18. When a paper is presented for probate, and it appears upon its face to be a will or codicil in regular form, without marks of alteration or other suspicious indications, the presumption is that the writing was on it when it was signed, and the testator knew its contents. The burden of proof is upon the contestants to show fraud, incapacity, or undue influence. *Ibid* 607
 19. The date of the execution of a will or codicil may be shown by the writing itself or by extraneous proof. The statute requiring that the signature of the testator be placed at the "end or close thereof" is complied with, although it precedes the date. *Ibid* . . 607
 20. The object of the exceptions to the rule admitting parties in interest to testify is to place both the parties upon an equal footing. In a contest as to the probate of a will, a devisee is a competent witness as to transactions between himself and the testator, all the claimants under the will being entitled to the same privilege. *Ibid*. 607
 21. The instructions objected to are error; but as they neutralize each other, they do not prejudice appellants. *Ibid* 607
(See *Husband and Wife*.)

WITNESSES—

1. A party who is making no issue hostile to the claim of a decedent's executor, is a competent witness when offered by a co-obligor who makes a defense against the estate. *Mix v. Marders' ex'r* . . 131
2. In a suit by an executor against a principal and surety, the principal makes no defense, and judgment is rendered against him. The surety relies upon usury, and offers the principal as a witness to establish his plea. He is a competent witness. *Ibid* . . 131
3. It was for the jury to decide upon the credibility of witnesses. *Evans v. Commonwealth* 414
4. There is no error in the instructions. *Ibid* 414
5. The appellant had exercised all proper diligence in attempting to obtain his witnesses, and the court should have granted him a continuance. *Salisbury v. Commonwealth* 425
6. Upon the trial of an indictment against a married woman and another for malicious cutting and wounding her husband, he is not a competent witness against his wife. *Turnbull v. Commonwealth* 495
7. Section 24, chapter 37, title "Evidence," applies to criminal as well as to civil cases. *Ibid* 495
(See *Evidence*.)

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